MAR 0 1 1993
OFFICE OF THE CLERK

No. 92-1421

IN THE

Supreme Court of the United States

October Term, 1992

Michael J. Haley

Petitioner,

vs.

Department of the Treasury, and
Merit Systems Protection Board

Responents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

Samuel H. Liberman,
8000 Maryland, Suite 750
Clayton, Missouri 63105
(314) 862-3333

Attorney for Petitioner

Revised Edition April 1, 1993

QUESTION PRESENTED

Whether the Court of Appeals erred in applying the standards of the Whistleblower Protection Act, which protect against any adverse personnel action taken against an employee because of "any disclosure of information by an employee.. which the employee... reasonably believes evidences a violation of any law, rule, or regulation, or...an abuse of authority," by refusing to consider Petitioners arguments that he reasonably believed that the Agency had abused its discretion, violated the Home Owner's Loan Act, the Community Reinvestment Act and the Financial Institutions Reform, Recovery and Enforcement Act of 1989, as well as the regulations and rules issued pursuant to these acts, and by ruling that Petitioner has no reasonable belief that the Agency had erred in rejecting a capital plan submitted by an institution.

LIST OF PARTIES

Michael J. Haley was the Petitioner below and is the Petitioner before this Court.

The United States Department of the Treasury was a Respondent below and is a Respondent. The United States Merit Systems Protection Board, was a Respondent below, although not named in the caption. It was the Agency which adversely determined Petitioner Haley's appeal from his termination by the Department of the Treasury.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
App. A: Opinion and Judgment of the United States Court of Appeals for the Federal Circirt	A-1
App. B: Order of Merit Systems Protection Board Denying Petition for Review	B-1
App. C: Initial Decision of Administrative Judge	C-1
App. D: Order Denying Petition for Rehearing and Suggestion for Rehearing in banc	D-1
App. E: Petitioner's Memorandum Protesting the Agency Action	E-1
App. F: 12 U.S.C. Sec. 1464 (d)(2)	F-1
App. G: 12 U.S.C. Sec. 1464 (t)(7)(c)	G-1
App. H: 12 U.S.C. Sec. 1729 (f)(5)(j)	H-1
App. I: 12 U.S.C. Sec. 2901 and 2903	I-1
App. J: Financial Institutions Reform Recovery and Enforcement Act of 1989, Sec. 401 (f)	J-1
App. K: 12 C.F.R., Sec. 567.10 (a)(2)	K-1

TABLE OF AUTHORITIES

CASES	PAGE
Statesman Savings Holding Corp. v. United States, 26 CL CT 904 (1992)	14
Winstar Corp. v. United States, 25 CL CT, 541 (1992)	14
STATUTES	
5 U.S.C. § 1214	3
5 U.S.C. § 1221 (a)	3
5 U.S.C. § 2302 (b) (8)	2,3,7
5 U.S.C. § 7703	3
12 U.S.C. § 1464 (d)(2)	12,13
2 U.S.C. § 1464 (t)(7)(c)	13
12 U.S.C. § 1729(f)(5)(j)	12,13
12 U.S.C. § 2901	14
12 U.S.C. § 2903	14
29 U.S.C. § 1254 (i)	2
Financial Institutions Reform and Recovery Act of 1989 § 401(f) 103 Stat. 356	12,13
REGULATIONS	
12 C.F.R. 567.10 (a)(2)	13
LEGISLATIVE HISTORY	
Sen. Rep. No. 413, 100th Cong., 2d. Sess. 12	9
Whistleblower Protection for Federal Employees, PL. Paige Whitaker, Congressional Research Service, Lib. of Cong., 1/10/90,IL.	10

No. 92-1421

IN THE

Supreme Court of the United States

October Term, 1992

Michael J. Haley

Petitioner,

vs.

Department of the Treasury, and
Merit Systems Protection Board

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

Petitioner, Michael J. Haley, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Federal Circuit in this proceeding.

OPINIONS BELOW

The opinion of the Federal Circuit (App. A), is reported at 977 F.2d 553 (Fed. Cir. 1992).

The opinion of the Merit Systems Protection Board is not published.

JURISDICTION

The opinion of the United States Court of Appeals for the Federal Circuit, along with that Court's judgment, were entered October 13, 1992. (App. A). The petition for rehearing and suggestion for a rehearing en banc, were denied by the Court of Appeals on December 2, 1992. (App. B).

The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The primary statutory provision involved in this proceeding is 5 U.S.C., §2302(b)(8), which provides;

An employee who has authority to take, direct others to take, recommend or approve any personnel action shall not...

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or application for employment because of

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences-

(i) a violation of any law, rule, regulation, or

(ii) gross management, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

Other statutes and regulations involved are set forth in Appendices F-K.

STATEMENT OF THE CASE

The controversy in this case arises out of the attempt by the Office of Thrift Supervision, Department of The Treasury, (hereafter "Agency") to remove the management and involuntarily merge a supervised thrift institution (hereafter called "The Institution") into another institution (hereinafter called the "Acquiror").

The Petitioner, Michael J. Haley, a senior examiner employed by the Agency, believed that the Agency had abused its discretion and was in the process of violating a number of statutes and regulations with regard to the proposed involuntary merger. In the attempt to prevent the completion of the involuntary merger, he wrote several memos to his superiors and gave copies of the memos to the managing officer of the institution for his use in going to his congressional representative and the chairman of the appropriate, House of Representatives Committee to get relief.

The Petitioner claims that these disclosures are protected under the Whistleblower Protection Act. 5 U.S.C. § 2302(b)(8). Petitioner was terminated due to his disclosures. This action arose as an individual right of action appeal to the Merit Systems Protection Board under 5 U.S.C. § 1221(a). After an adverse initial decision by the administrative judge, Petitioner filed a Petition for Review which was denied by the Merit Systems Protection Board on October 22, 1991 without further opinion. Petitioner thereupon filed a Petition for Review of the final decision of the Merit Systems Protection Board in the United States Court of Appeals for the Federal Circuit pursuant to 5 U.S.C. § 1214 and § 7703.

While the Petitioner raised arguments regarding the refusal to let Petitioner proceed with an adverse action appeal, the prejudgment of the case by the administrative judge, and the claim that the disclosure was absolutely protected because it was intended for Congress, this Petition for Certiorari is based upon the Petitioners claim that his disclosures were protected under the Whistleblower Protection Act.

This portion of the case is addressed by the Court of Appeals at A-5-A-7. The Court, considered only whether or not the Petitioner had an objective belief that the Agency's denial of

the institution's capital plan constitutes a violation of law or regulation. It concluded that the Agency had broad discretion in the evaluation of the capital plan and that Petitioner's claim was therefore untenable. Petitioner claims that by limiting its outlook to only the question of the evaluation of the capital plan the Board and the Court ignored the other more gross and more clear violations of law and the abuse of authority which the Agency committed and which Petitioner reasonably relied upon in making his disclosure. Petitioner contends that the Court has erred in applying the statute to the situation at hand by refusing to consider the primary violations about which Petitioner was blowing the whistle. Petitioner also believes that the Court and the Board erred even as to the limited question regarding the approval of the plan.

The Court of Appeals held that Petitioner did not have a reasonable belief that there was a violation of law, regulation or rule, or an abuse of discretion and that therefore he was not protected by the Whistleblower Protection Act.

The only evidence cited by the Court other than the discretion of the Agency with regard to approval of the plan was that Petitioner could not have held such a belief because of his long service as an examiner. A-7.

Petitioner contends that after terminating him, the Agency eventually adopted his view and granted the institution the opportunity to reorganize and continue as had been advocated by Petitioner in his Memoranda.

While the foregoing statement is sufficient factual background to illustrate the importance of the case and the reasonability of Petitioner's position, Petitioner will also set forth some of the evidence regarding the more important facts and regulatory provisions which supported his belief that the law and rules were being violated in a number of ways and that, in any event, the Agency was abusing its authority by its actions.

The institution had faced serious financial trouble in the early 80s, and at one time had a deficit retained earnings of $700,000.00, excluding certain Net Worth Certificates issued by the institution and held by FDIC as successor to FSLIC. The Agency for some time had been planning to remove the management and cause the involuntary merger or acquisition of the institution by a third party. However, as early as May, 1988, it

issued a Memorandum which acknowledged that legally it would be difficult to force a merger as long as the association is profitable, its capital position continues to improve and it is substantially in compliance with a supervisory agreement. Mr. Haley had made earlier attempts to prevent the removal of management by conversing on numerous occasions with his superiors.

Mr. Haley was very familiar with the institution's history as an O.T.S. examiner. He determined in July of 1990 that its deficit had been erased and that the company had a consistent showing of positive earnings with larger earnings projected for the future. All of this happened despite the Agency's previous order that the institution sell its most profitable assets.

Mr. Haley believed that the institution had recovered so successfully that there was no basis to require removal of the management or involuntary merger.

In the effort to accomplish the takeover, the Agency invoked new legislation enacted by Congress in 1989. This law, the Financial Institutions Reform Recovery and Enforcement Act of 1989 (hereinafter FIRREA), amended the Home Owner's Loan Act by requiring thrift institutions such as the institution to meet more stringent capital requirements. This legislation and the Agency regulations issued pursuant thereto became the basis of a new attempt by the Agency to remove management and cause an involuntary merger with another institution in 1990.

Mr. Haley believed that the Agency's actions in this regard were unlawful and beyond its discretion even under FIRREA. He blew the whistle by preparing several Memoranda stating his concerns, which he distributed on July 4 and 6, 1990, to the Managing Officer of the institution, for the institution's use in appealing to Congress.

The institution was, arguably, deficient in meeting the capital requirements as initially set forth by the Agency pursuant to FIRREA. As required by an Agency Thrift Bulletin the institution submitted a capital plan in the early part of 1990. On or about June 21, 1990, Mr. Haley learned that this plan had been rejected. He also learned that the institution had been asked under threat of receivership to sign a Consent Agreement agreeing to an involuntary merger and resignation of its management

upon demand by the Agency; and that his superior, Mr. Maffitt had already solicited potential acquirers.

According to Mr. Haley's testimony and even as admitted by the only witness for the Agency, Mr. Maffitt, this was a death sentence from which only one other institution had ever been reprieved.

Mr. Haley's belief that the law was being violated was further strengthened by his discovery that the Agency was taking the position that certain Net Worth Certificates (NWCs) held by the F.D.I.C. could not be counted as capital or converted to capital instruments. Petitioner learned that contrary to the Agency's position, the FDIC was willing to convert the NWCs to preferred stock and to forgive an account payable owed by the institution in connection therewith. He learned that his superior, Mr. Maffitt, was asking that the account payable be forgiven for an acquiror, while attempting to block the same relief for the institution. He learned that the Agency was aware that FDIC was willing to forgive the account payable as early as June 15, 1990, but that the Agency had kept this knowledge from the institution. In fact, the Agency had known as early as January 17, 1990, that the FDIC had indicated that the institution would be able to convert the Net Worth Certificates to some form of preferred stock if there was a conversion, but still adopted the misleading position that this was not possible in dealing with the Institution.

On April 9, 1990, Maffitt was advised by superiors in Washington to tell the institution that the capital plan would be rejected unless the Institution could obtain written assurances that FDIC would agree to its requests. Instead of informing it that the FDIC had already indicated a willingness to agree to these requests, Maffitt called the FDIC and lobbied it to reject the institution's request. On April 26, 1990, in response to his efforts, Mr. Maffitt received a letter from FDIC indicating that FDIC would not attempt a restructuring or conversion of the Net Worth Certificates if the Agency itself did not approve the plan. This FDIC communication was based on information regarding the feasibility of a stock conversion supplied to FDIC by Maffitt himself on April 9, 1990. Mr. Haley believed this information was incorrect. (His belief was subsequently confirmed when the Agency later approved the stock conversion.)

Mr. Haley thereupon wrote Memoranda dated July 3,

1990, July 6, 1990 and July 12, 1990, addressed to his superiors. Taken together, these documents summarize the reasons for Haley's belief that the Agency had violated the law and exceeded its authority; particularly in comparison to treatment given by the Agency to other larger institutions in much weaker financial condition.

Shortly after the Agency found out about Mr. Haley's attempt to blow the whistle on its activities, it terminated his employment. The stated reason for his discharge was that the disclosure allegedly violated certain standards of conduct relating to disclosure of information.

Unlike many Whistleblower appeals there is no contention by the Respondent in this case that Mr. Haley's disclosure was not the reason for his discharge, or that Mr. Haley would have been terminated for poor performance in any case.

The Agency made some attempt to contend that the disclosures made by Mr. Haley fell within the WPA exception for "disclosures specifically prohibited by law," but this exception covers only disclosures specifically prohibited by statute. The Administrative Judge recognized that the Board was unable to rely on this exception, and it is not an issue in the appeal.

It would seem that the facts presented a clear whistleblower retaliation, but the Court below sustained the Agency, focusing only on the Agency's action with regard to disapproving the plan, and holding that Mr. Haley had no reasonable belief that the Agency had violated any law ruling or regulation, abused its authority, committed gross mismanagement, gross waste of funds, or a substantial damage to public health and safety, as required by 5 U.S.C. Sec. 2302 (b)(8).

REASONS FOR GRANTING THE WRIT

I

The Court incorrectly applied the Whistleblower Protection Act by limiting its inquiry as to whether the Petitioner had a reasonable belief that the Agency had abused its discretion in approving the Institution's capital plan. It erred in failing to consider the broader question as to whether Petitioner made a disclosure of information which he reasonably believed to

evidence a violation of law, rule or regulation or an abuse of authority.

Petitioner's initial memorandum dated July 3, clearly stated that he was not protesting the disapproval of the capital plan but the entire arbitrary treatment. He started off by saying, "I am writing this memorandum to protest the unnecessary arbitrary treatment of [the Institution] by this supervisory authorities of the office of the Thrift Supervision. E-1. After outlining his experience with the institution, and the institution's progress, Petitioner did then indicate that there was a capital problem and that the capital plan had been disapproved because its proposed stock offering was not considered feasible. E-2.

But immediately Petitioner went on to indicate that the Institution had been asked to approve a consent agreement giving the OTS the authority to remove management and merge them with another institution at any time. The second paragraph on makes it absolutely clear that Petitioner objected "most strenuously [to] the necessity of removing the Board of Directors and management that has performed so well from an institution for which the prospects are so favorable." He then outlined the reasons why management removal is not necessary. E-3.

Petitioner went into detail regarding the failure of the potential acquiror to make loans within its own community, and the Agency's abandonment of its duty to enforce the Community Reinvestment Act by allowing and causing such a merger. E-5 - E-6.

Mr. Haley went on to state: "It has been extremely disheartening for me to watch the agency for which I have worked 13 years focus so much of its energies on removing the board of directors and management of a small institution that has over comes much adversity and for which the prospects are so bright. Add to this my knowledge that [the institution's] managing officer is a selfless man who has devoted 42 years of his life to the institution, nurturing it from total assets of $250,000 to its present size, while never paying himself a salary of as much as $30,000, and is the closest reincarnation of the George Bailey character form the "It's A Wonderful Life" movie that I encountered in my 13-year examining career, has only made me feel worse." E-6. Mr. Haley in short, protested the removal of management and the involuntary merger. He went on to outline his request that

management receive a fair shake in future dealings with the office of the OTS and made specific suggestions that

1. The Institution be permitted to proceed with its stock offering, suggesting the pledging of deposits or assets by management to insure that there would be no risk if the offering did not succeed.

2. Granting an exemption from sanctions as outlined in OTS Thrift Bulletin 36a.

3. Approval of a plan to meet capital requirements solely through retention of earnings.

4. Forgiving an accrued interest payable on the net worth certificates owed to the FDIC.

5. Restructuring the net worth certificates so they might qualify as core capital. E-6 - E-7

Paragraphs 1, 4, and 5 are precisely the alternatives subsequently adopted by the Agency after Mr. Haley was terminated.

The Whistleblower Protection Act requires that the employee have made a disclosure of information which he reasonably believed evidences a violation of any law, rule or regulation or abuse of authority. Mr. Haley did not specifically allege that the failure to approve the capital plan was a legal violation. Even if his memo is taken to imply this he was not wrong about the other violations of law set forth in his memo and the abuse of discretion, it is not a proper interpretation of the Whistleblower Statute to pull one questionable item out of a lengthy disclosure and therefore hold that the employee could not have reasonably believed that there was a violation of law or an abuse of authority.

Such a holding makes it impossible for a Whistleblower to make a protected disclosure. He would be required to make a blanket statement that the agency was violating the law without any particulars in order to avoid the risk that he might risk the fact that he is wrong in one particular. The purpose of the law was to protect whistleblowers. The "reasonable belief" language was inserted to protect the whistleblower where he might be in fact be wrong about a violation of law or an abuse of discretion but still have a reasonable belief that he was right. S. Rep. No. 413, 100th Cong., 2d Sess. 12. This was intended to create only a good faith requirement. In theory, the actual veracity of any

disclosure does not effect whether it is protected. Whistleblower Protection for Federal Employees, L. Paige Whitaker, Congressional Research Service, Library of Congress, January 10, 1990, 16. No one questions Petitioner's good faith. He had no other possible motive for making this disclosure, which he knew might cost him his job. The question is whether he was so completely mistaken that his belief was not reasonable.

The law must be applied to the disclosures as a whole and to reasonability of the employee's belief that the disclosure as a whole evidences a violation of law, rule or regulation or gross mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger too public health or safety. By ignoring all the rest of Mr. Haley's disclosures and ignoring his reasons for believing that the violations and abuse of authority had occurred, the court has disemboweled the Whistleblower Protection Act.

It would seem that in order to hold that Petitioner's belief was unreasonable, the Court would have to point out where his belief was wrong.

However, in making its ruling the Court, ignored the evidence as to whether a reasonable person could have believed that Petitioner's disclosure evidenced such a violation. The Court simply repeated the conclusion that a person with Petitioner's long experience as an examiner could not have believed that there was a violation. The evidence, however, clearly shows that he held such a belief and that such a belief was not only reasonable but correct. The reasonability of this belief cannot be determined without examining Petitioner's disclosures, and examining the law and regulations. This is because the question of the reasonability of his belief is determined by the applicable law and the facts of the particular case upon which the Agency was acting.

The Court has chosen to focus its discussion of this issue on the sole issue of whether Petitioner had the requisite reasonable belief that the activities of his superiors involving the rejection of the institution's requested plan violated FIRREA and the regulations implementing that statute. The Court concluded that the statute granted broad discretion in the evaluation of any capital plan submitted by an institution, and that therefore the clear language of the relevant authorities made his claim of

reasonable belief untenable. A-7.

The Court, ignored all of the other alleged violations of law.

Petitioner's memo indicated that the Agency demanded that the institution's Directors approve a consent agreement giving the Agency power to remove them and to merge the association with another institution involuntarily, and threatened to appoint a receiver unless the Director signed. Mr. Haley objected to this action "most strenuously" and outlined why there was no risk to the insurance fund in allowing the institution to continue to operate, how the company had become profitable, how the management was rated as competent and how the institution was capable of completing a stock conversion in compliance with FIRREA in order to meet capital requirements within the necessary time frame. He also mentions that he did not believe that Congress intended the FIRREA legislation to be used as a pretext for taking away a profitable business "from anyone without a lengthy period of due process and until all reasonable alternatives are exhausted." He specifically objected that the proposed action was a merger into a separate institution which itself had not met legal requirements of the Community Reinvestment Act.

Petitioner Haley also indicated that the institution should receive an exemption from sanctions which could be imposed for failing to submit an acceptable capital plan and that the institution had Net Worth Certificates which were statutory capital, and which could be converted into core capital in which case, capital requirements could be met. In a second memo, Mr. Haley pointed out that much larger institutions in much worse financial shape had been treated more favorably. A third memo elaborated on the feasibility of the stock conversion plan.

While the Agency may have had discretion in deciding to accept or reject a capital plan, Mr. Haley has demonstrated with all the evidence presented at the Board hearing that the Agency abused this discretion by making the rejection final, without opportunity to revise the plan, and then taking the next step to force an involuntary merger of the institution, by demanding that the institution sign a consent to merge agreement. The Agency threatened to appoint a conservator immediately if the institution refused to sign the consent to merge agreement.

Furthermore, the Petitioner was not alone in his belief

that the Agency intended to force this merger and that at the least it was an abuse of discretion. Another examiner, familiar with the case, agreed with him, not to mention the managing officer of the institution and the Congressional Representative representing the district where the institution was located.

The Court and the Board cited no evidence whatsoever, other than the Petitioner's length of service to justify its conclusion that his belief that the Agency had abused its authority was not reasonable. In fact, the evidence clearly supported the view that Haley's conclusion was reasonable because after the whistle was blown, the Agency reversed itself and adopted Mr. Haley's point of view by approving the stock conversion plan.

Petitioner questions how it is possible to contend that Mr. Haley could not reasonably hold a belief that the Agency abused its authority in rejecting the plan, when after the whistleblowing act of Petitioner, the Agency changed its mind and adopted Mr. Haley's view that the plan was acceptable. If Mr. Haley's view was unreasonable, than the Agency itself is now unreasonable.

Assuming that the rejection of the capital plan was not a violation of FIRREA, Petitioner has argued additionally that he had a reasonable belief that other provisions of the law were being violated:

A. Regardless of the acceptability of the capital plan, there was no statutory or legal basis for the threatened removal of management and appointment of a receiver. This constituted a violation of 12 U.S.C. Section 1464 (d) (2) (c). Mr. Haley's July 3, 1990 memorandum clearly protests the legality of this excess of statutory authority. E-2, E-3. The Court below has completely disregarded this argument.

B. While there may be a question as to whether the net worth certificates had to be included in core capital for regulatory purposes, there is no question that they had to be included for purposes of 12 U.S.C. § 1464 (d), the statute setting forth grounds for appointment of a receiver or a conservator. The threat to appoint a receiver was invalid and unlawful.

Even if the Net Worth Certificates were not constitutionally protected as regulatory capital, Section 1729 (f) (5) (j) of the NHA as preserved by Section 401 (f) of FIRREA, clearly provides that the Net Worth Certificates are still to be considered statutory

capital. The actions of the Agency in threatening conservatorship and requiring the institution to agree to the same were not based on any legal authority, because the institution was not insolvent and had substantial statutory capital, 12 U.S.C. Section 1464 (d) (2). Neither the Agency, the Board, or the Court has yet dealt explicitly with this issue.

C. The institution qualified for an exemption from the sanctions under 12 U.S.C. Section 1464 (t) (7) (C), 12 C.F.R. Sec. 567.10 (a) (2). In this instance, the administrative judge focused solely on the statute, which is ambiguous, and may be interpreted as requiring an acceptable plan as a prerequisite for granting an exemption from sanctions, which can be imposed if the plan is not accepted. He ignored the Agency's own regulation which omits the necessity for an acceptable capital plan as one of the requirements for an exemption. Since only institutions not having acceptable plans would require an exemption, the interpretation suggested by Respondent and adopted by the administrative judge is senseless. Under this interpretation of the law, the only institution which could qualify for an exemption would be one that had submitted an acceptable plan and would have no need for an exemption.

Accordingly, Petitioner Haley believed that the law did not require the existence of a plan acceptable to the Agency as a requirement for an exemption to be considered. The reasonability of this belief is proven by the fact that the Agency itself adopted the same belief in its Regulation, 12 C.F.R Sec. 567.10 (a)(2) and (a) (3). K-1. Petitioner also relied on internal agency publications, similar to the Regulations. There is simply no evidence that Petitioner's belief that the institution was entitled to an exemption was unreasonable.

D. The Agency violated the law by incorrectly computing the institution's capital in violation of 12 U.S.C. Section 1729 (f) (5) (J) and the specific provision of Section 401 (f) of FIRREA requiring that the Law in question "shall not effect the validity of any right, duty, or obligation of the United States, the Federal Savings and Loan Insurance Corporation or any other person which arises under Title IV of the National Housing Act and existed the day before the enactment of FIRREA." 103 Stat. 356. J-1. Under this provision the Net Worth Certificates issued by the institution to a federal agency, as a matter of constitu-

tional law, had to be counted as statutory and regulatory capital.

While it can be argued that FIRREA, by authorizing the imposition of new capital standards allowed the Agency to exclude the value of the Net Worth Certificates from core capital for regulatory purposes, it is not an unreasonable view that such provision is an unconstitutional interference with the obligation of the contract involved. Mr. Haley testified that he believed this was the case. The Courts which have considered the contract issue have held that although Congress had the authority to change the standards, the institutions involved have a right to enforce their contract claim in the Court of Claims. Winstar Corp. vs. United States, 25 CL. CT. 541 (1992). See also Statesman Savings Holding Corp. vs. United States, 26 CL CT 904 (1992).

Neither the Board, the Agency, nor the Court cited any law or evidence which would indicate that Mr. Haley's belief that the status of the Net Worth Certificates as capital was protected by the Constitution was unreasonable.

E. The Agency ignored its responsibility to enforce the Community Reinvestment Act, 12 U.S.C., Sec. 2901 et seq., by providing and planning for the merger of the institution with an institution which had a poor if not non-existent record of making loans in the same and/or other areas where it was located.

Finally, Mr. Haley could have reasonably believed that the capital plan was acceptable.

The capital plan rejected by the Agency was in fact eventually approved. There was no significant difference in the plan as eventually approved than that originally submitted by the institution. The plan was later accepted upon two conditions: First, the management must guarantee expenses of reorganization, in case of failure. Second, that the management come up with a list of prospective shareholders. The first of these suggestions was made by Mr. Haley in his Memorandum. The testimony showed that the management was willing to meet these two conditions. It had in fact not provided a list of shareholders due to questions concerning securities registration. It was able to do so immediately upon being asked. Neither of these conditions was a modification in the plan itself, but a condition for approval of the plan. The action questioned by Mr. Haley was the

outright rejection of the plan, which contained no suggestions for possible additional action which might be taken to make the plan approvable.

Based on the information available to Mr. Haley, an objection to the rejection of the plan was eminently reasonable. The Board and Court had no evidence to the contrary, and in fact the ultimate acceptance of the plan by the Agency proves that its initial rejection was unreasonable.

In summary, Petitioner contends that by focusing solely on the rejection of the capital plan, the Court has ignored most of the legal requirements cited and relied upon by the Petitioner for his belief that the Agency violated a law, rule or regulation.

Further, the Court has totally ignored the uncontested fact that not only did Mr. Haley have a reasonable belief that he was correct, but that the Agency in effect conceded that he was correct in finding that it was abusing its authority because it reversed its position and the institution is still in existence now.

In light of the circumstances, the decision that Mr. Haley had no reasonable belief that there was a violation of law or rule and/or an abuse of the Agency's authority is unmitigated double talk.

Although the opinion of the Court of Appeals suggests that it is a factual issue as to whether Mr. Haley had a reasonable belief regarding violation of these various provisions of law and regulation, Petitioner suggests that it is more than an evidentiary question. By ignoring the evidence and the authority cited and relied on by Petitioner, the Court had mistakenly interpreted not only the Whistleblower Protection Act, but the various laws and regulations relied on by Petitioner.

It would appear that the reason for the "reasonable belief" clause provided in the Whistleblower Protection Act was to broaden the protection; so that the whistleblower need not prove a violation of the law but merely prove that he had a reasonable belief that there was a violation. This does not take away the fact that if the Agency was acting illegally the whistleblower is protected. The Court by ignoring the various provisions of law and the Petitioner's arguments with respect to them has essentially invalidated these laws and regulations and ruled that a whistleblower has no right to rely on them. This is a misreading of the law which requires a hearing before this Court.

If a glib conclusion that such belief was unreasonable based only upon the Petitioner's length of service as an examiner is sufficient to end the argument, then the whole purpose for the Whistleblower Protection Act is defeated because this conclusion can always be advanced without regard to the law and regulations in question or to the whistleblower's motivations.

Petitioner is aware of no other case where Whistleblower Protection Act coverage has been denied for this reason and feels that the Agency and the Court have misinterpreted the law in a substantial and crippling fashion. Petitioner contends that this is an important question of Federal law which has not been but should be settled by this Court.

CONCLUSION

For the reasons set forth above Petitioner requests this Court grant a Writ of Certiorari, reverse the decision of the Court of Appeals and order Petitioner's reinstatement together with back pay, costs, attorneys fees and all other appropriate relief.

SAMUEL H. LIBERMAN,
8000 Maryland Avenue Suite 750
Clayton, Missouri 63105
(314) 862-3333

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

92-3077
MICHAEL J. HALEY,
Petitioner,
v.
DEPARTMENT OF THE TREASURY,
Respondent.

DECIDED: October 13, 1992

Before LOURIE, Circuit Judge, RADER, Circuit Judge, and MILLS, District Judge, */MILLS, District Judge,

We deal here with the disclosure of confidential information. Consequently, there was a Stipluated Protective Order, and the oral arguments before this court were closed to the public.

I. Procedural History

Petitioner Michael J. Haley petitions for judicial review of the June 4, 1991 decision of the Administrative Judge (AJ), Docket No. SL122191W0098, dismissing the petitioner's claim for corrective action under 5 U.S.C. § 1221 (Supp. II 1990) and determining that it was without jurisdiction to entertain his appeal under 5 U.S.C § 7701(a) (1988). The petitioner was removed from his position as a Senior Examiner with the Office of Thrift Supervision, Department of the Treasury (the "Agency" or "OTS"), for violating standards of conduct regarding the release of confidential information to unauthorized individuals. The AJ's decision became the final decision of the Merit Systems Protection Board when the Board denied review on October 22, 1991.

II. Factual Background

Petitioner began his federal service in 1977 as an Examiner with the Federal Home Loan Bank Board (the "FHLBB") and during his tenure with the FHLBB was in the competitive service. When the FHLBB became an independent government

**Honorable Richard Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.*

corporation in 1985, Petitioner consequently lost his status as a federal employee. Pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), the FHLBB was abolished and on October 8, 1989, Petitioner became an employee of the Agency.

While employed as a Senior Examiner with the Agency, Petitioner became familiar with the fiscal condition of the Marion County Mutual Loan and Building Association ("MCM"), a savings and loan association in Hannibal, Missouri. Because MCM did not meet the stringent capital requirement imposed pursuant to FIRREA, it was required to submit to the Agency a capital plan (the "Plan") demonstrating that the capital requirements would be met within a reasonable period of time.

MCM submitted its Plan to the Agency in early 1990 explaining that "[t]he primary feature of the Plan will be to complete a conventional conversion to stock form by December 31, 1990, with a simultaneous conversion of net worth certificates and/or accrued interest payable to GAAP [generally accepted accounting procedures] equity . . . ." MCM's Plan was subsequently rejected by the Agency.

On April 30, 1990, in conjunction with the denial of the Plan, MCM was asked by the Agency to sign a Consent Agreement. When executed by both parties, the Consent Agreement would: (1) place restrictions on the operation of MCM: (2) provide for the appointment of a conservator or receiver; (3) authorize the Agency to negotiate a plan of merger, consolidation, or reorganization; and (4) allow for changes in the management of MCM.

On July 3, 1990, Petitioner prepared a memorandum addressed to Robert A. Maffitt, Director of Field Operations for the Agency, criticizing the supervisory officials of the Agency for failing to approve MCM's Plan. This memorandum contained the Agency's confidential financial information about the failing savings and loan institution, the potential removal of MCM's Board of Directors and management, and the possible merger of MCM with another institution. Petitioner sent a copy of the memorandum to Bayard Plowman, Managing Officer of MCM, encouraging Plowman to forward copies of the memorandum to his Congressman and to the head of the House of Representatives Banking Committee.

On July 26, 1990 due to his distribution of confidential information to unauthorized personnel in the aforementioned memorandum, Petitioner was removed from his position with the Agency.

III. Standard of Review

The standard of review for this court in considerting the Board's decision is limited. "The agency action must be sustained unless it is found to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedure required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence . . . ." Warren v. Dep't of the Army, 804 F,2d 654, 655-66 (Fed. Cir. 1986).

We note as an initial premise that this court's proper role is not to conduct a de novo review of the findings reached by the Board. Instead, this court must determine whether the Board's decision is supported by substantial evidence. In addition, while the Petitioner offers a multitude of arguments in support of his position that the Board erred in reaching its conclusions, this court will address only those which it feels have sufficient merit to warrant consideration.

IV. Analysis

A. The Board's Jurisdictional Authority to Entertain Petitioner's Due Process Claim

Petitioner first contests the Board's determination that it lacked jurisdiction to entertain his claim: that the Agency failed to give him any procedural safeguards when effecting his removal. He argues that because he was in the competitive service until 1985 (the date on which the FHLBB became an independent government corporation) when he became employed by the Agency in 1989 he reentered as a federal employee and was therefore entitled to return to a position in the competitive service. Petitioner contends that the Agency had no right to reinstate him as an excepted employee because pursuant to 5 C.F.R. § 6.1(a) the Agency could not show that his position as an Examiner should have been one excepted from the competitive serivce.

The Board rejected Petitioner's argument concluding that "OTS appointed the appellant to the excepted service as

authorized by OPM [the Office of Personnel Management][("OPM")]. Therefore . . .he is not entitled to appeal to the Board under 5 U.S.C. § 7511(a)(1)(A)(i)."

Pursuant to 5 U.S.C. § 7511(a)(1) (Supp. II 1990), an employee who is entitled to appeal to the Board is defined as:

> (A) an individual in the competitive service—
>
> (i) who is not serving a probationary or trial period under an initial appointment; or
>
> (ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;
>
> (B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—
>
> (i) in an Executive agency; or
>
> (ii) in the United States Postal Service or Postal Rate Commission; and
>
> (C) an individual in the excepted service (other than a preference eligible)—
>
> (i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or
>
> (ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 year or less; . . . .

As properly established by the Board, "[t]he agency's proof demonstrated that the Office of Personnel Management (OPM) placed all positions of OTS involved in the supervision of savings associations in the excepted service under schedule A as required by Civil Service Rule VI." Pursuant to 5 C.F.R. § 6.1(b) (1992) "OPM shall decide whether the duties of any particular position are such that it may be filled as an excepted position under the appropriate schedule." Here, the Agency appointed Petitioner to a position in the excepted service as authorized by OPM. Petitioner fails to cite any persuasive authority in support of his position that he was entitled to appeal his removal to the Board as an "employee" under 5 U.S.C. § 7511(a)(1)(A). Moreover, because Petitioner was removed from his position effec-

tive July 26, 1990, he is not entitled to appeal under section 7511(a)(1)(C). 5 U.S.C. § 7511 note (Supp. II 1990) (provision only applies to personnel actions taking effect on or after August 17, 1990). Accordingly, the Court rejects his position and affirms the decision of the Board.

B. The Protection Afforded Petitioner By 5 U.S.C. § 2302(b)(8)

Petitioner next contends that the Board erred in concluding that his disclosure of confidential information to the management of MCM was not protected pursuant to 5 U.S.C. § 2302 (b)(8) (the "Whistleblower Protection Act").

Before the Board, Petitioner argued that his dismissal by the Agency violated the Whistleblower Protection Act as his disclosures fell within the ambit of the act. In considering his claim, the Board, inter alia, concluded that when he made the disclosure Petitioner did not have the requisite reasonable belief that the activities of his superior involving the rejection of MCM's Plan violated FIRREA or the regulation implementing the statute. Against that reasonable belief, the Board found that Petitioner had failed to present a prima facie case of reprisal for whistleblowing, Gergick v. General Servs. Admin., 43 M.S.P.R. 651, 659 (1990), and accordingly rejected his argument. When considering Petitioner's claim, the Board first examined the nature and content of his disclosure. The Board concluded that "[a] thorough review of the appellant's disclosure demonstrates that he was actually expressing his disagreement with the rejection of the capital plan. This rejection prompted OTS's request for MCM to sign a consent agreement which would result in the removal of the Board of Directors and managing officers at MCM." Concluding that Petioner's disclosure was not protected, the Board stated "that is was not reasonable for the appellant, an experienced examiner of savings associations, to believe that OTS's rejection of MCM's capital plan was a violation of FIRREA or the regulations implementing the Statue." Pursuant to 5 U.S.C. § 2302(b)(8) (Supp,. II 1990), any employee who has the authority to take or direct others to take, recommend or approve any personnel action shall not with respect to such authority:

> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or application for employment because of—

> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences-
>
> (i) a violation of any law, rule, or regulation, or
>
> (ii) gross management, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
>
> if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; [Emphasis ours.]

As noted above, the Board concluded that given Petitioner's extensive experience as an examiner of savings associations, he did not have a reasonable belief that OTS's rejection of MCM's capital plan constituted a violation of FIRREA or the regulations implementing the statute. This Court agrees.

12 U.S.C. § 1464(s)(4)(A) (Supp. II 1990) provides:

> In addition to any other action authorized by law, including paragraph (3), the Director may issue a directive requiring any
> savings association which fails to maintain capital at or above the minimum level required by the Director to submit and adhere to a plan for increasing capital which is acceptable to the Director,. [Emphasis ours.]

In addition, 12 U.S.C. § 1464(t)(6)(A)(ii) (Supp. II 1990) provides that the Director can require any savings association in noncompliance with capital standards to submit a plan that: (1) addresses the savings associations's need for increased capital; (2) describes the manner in which the savings association will increase its capital; (3) specifies the types and levels of activities in which the savings association will engage; (4) requires any increase in assets to be accompanied by an increase in tangible capital not less in percentage amount than the leverage limit then applicable; (5) requires any increase in assets to be accompanied by an increase in capital not less in percentage amount than required under the risk-based capital standard then applicable; and (6) is acceptable to the director. [Emphasis ours.]

The Agency periodically issued guidelines for FIRREA capital plans, exemptions, and exceptions in documents entitled

Thrift Bulletins ("TBs"). TB 36, the TB in effect at the time MCM submitted its capital plan provides in relevant part that "FIRREA requires that a savings association that fails any one of the capital standards, shall submit a capital plan and may apply for a limited capital exception, an exemption from a supervisory sanction or restriction, or a limited growth exception."

As concluded by the Board, "[t]he statute is specific that the required capital plan for increasing capital must be acceptable to the Director. There is no standard under FIRREA requiring approval of a capital plan for an association which fails to comply with capital standards." The Board continued:

> Based on this authority indicated in the statue, I do not find that the appellant, an Examiner with OTS for approximately nine monthes when he made his disclosure (but an Examiner for 13 years in total), reasonably believed that OTS' action rejecting MCM's capital plan was a violation of the FIRREA statute.

The Court concurs with the Board's evaluation of the relevant statutory authority and with its conclusion that Petitioner did not have an objective belief that OTS' denial of MCM's capital plan constituted a violation of law or regulation. The relevant statues clearly granted broad discretion in the evaluation of any capital plan submitted by MCM. Petitioner's experience as an Examiner and the clear language of the relevant authorities make Petitioner's claim untenable.

C. Petitioner's Disclosure to Congress

5 U.S.C. § 2302(b) (Supp. II 1990) states that "This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to theCongress." Petitioner argued that because his disscrimination of confidential information to the management of MCM included a suggestion to share the information with members of Congress, that his disclosure is protected by § 2302(b). The Board rejected Petitioner's argument as does this Court.

As noted by the Board, the Petitioner testified that he neither shared his letter with any member of Congress nor believed that the management of MCM would follow his sugges-

tion to do so. Morever, it is undisputed that the Agency dismissed the Petitioner not for disclosing information to a member of Congress but instead for disclosing information to the officer of a savings and loan association under its supervision. This Court concurs with the Board that 5 U.S.C. § 2302(b) offers no relief to the Petitioner.

D. Disqualification of Administrative Judge

Petitioner argues that the AJ demonstrated that he had reached a conclusion on the merits of Petitioner's claims prior to the presentation of evidence by the parties as evidenced by his denial of Petitioner's motion for a stay of his removal in an order issued on January 15, 1991. Petitioner's subsequent motion for the AJ to disqualify himself was denied. This Court affirms the AJ's decision.

"There is a strong presumption in the law that administrative actions are correct and taken in good faith." Sanders v. United States Postal Serv., 801 F.2d 1328, 1331 (Fed. Cir. 1986). More specifically, "[i}t is well established that there is a presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with law and governing regulations and the burden is on the plaintiff to prove otherwise." Parsons v. United States, 670 F.2d 164, 166 (Ct. Cl. 1982) (citing United States v. Chemical Found., Inc., 272 U.S. 1, 14-15 (1926)).

Here, the AJ was required to make a finding as to whether there was a substantial likelihood that Petitioner would prevail on the merits. That finding necessitated his examination of the facts surrounding Petitioner's discharge and the formation of an initial impression of Petitioner's contentions. Petitioner has failed to demonstrate that the AJ's subsequent thorough and complete review of the facts and law of this case were in any way tainted by a predisposition in favor of the Agency. Accordingly, the Court affirms the AJ's denial of Petitioner's motion to disqualify him.

V. Conclusion

With the foregoing standard of reivew in mind, we have evaluated all the arguments set forth in the briefs, the exhibits constituting the record before the Board, and the Board's opinion. We hold that the decision of the Board was supported by

substantial and competent evidence and was not arbitrary or capricious, or an abuse of discretion.

Ergo, we affirm the Board in all respects.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

92-3077

Michael J. Haley

Petitioner,

v.

Department of the Treasury

Respondent.

JUDGEMENT

On Appeal from the **Merit Systems Protection System**
in Case No(s). **SL122191W0098**
This Cause having been heard and considered, it is
Ordered and Ajudged:

AFFIRMED

Date October 13, 1992 Entered by Order of the Court

_____

Francis X. Gindhart, Clerk

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MICHAEL J. HALEY,
Appellant,

DOCKET NUMBER
SL122191W0098

v.

DEPARTMENT OF THE TREASURY,
Agency.

DATE: OCT 22, 1991

Samuel H. Liberman, Esquire, Clayton, Missouri, for the appellant.

William T. Nassif, Esquire, Des Moines, Iowa, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on June 4, 1991, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United State Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United State Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. 7703(b) (1).

FOR THE BOARD:

_____

Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATE OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ST. LOUIS REGIONAL OFFICE

MICHAEL J. HALEY,
Appellant,

DOCKET NUMBER
SL122191W0098

v.

DEPARTMENT OF THE TREASURY,
Agency.

Date: June 4, 1991

Samuel H. Liberman, Esquire, St. Louis, Missouri, for the appellant.
William T. Nassif, Esquire, Des Moines, Iowa, for the agency.

BEFORE
T. Christopher Heavrin
Administrative Judge

INITIAL DECISION

On December 19, 1990, the appellant timely sought corrective action from the Merit Systems Protection Board (the Board) under 5 U.S.C. § 1221(a) and 5 C.F.R. § 1209.5(a). By filing an individual right of action (IRA) appeal, the appellant challenged his removal from the position of Senior Examiner, Des Moines District Office, Office of Thrift Supervision (OTS), with post of duty in St. Louis, Missouri. The effective date of the removal was July 26, 1990. The appellant maintained that the foregoing personnel action was taken in reprisal for his making a protected disclosure as defined in 5 U.S.C. § 2302(b) (8). [1] See 5 U.S.C. § 1221(a) and 5 C.F.R. § 1209.5(a). [2]

The Board will order appropriate corrective action if the appellant shows by a preponderance of the evidence that a disclosure described under 5 U.S.C. § 2302(b) (8) was a contributing factor in the personnel action that was taken against him. However, even where the appellant meets the foregoing burden,

the Board will not order corrective action if the agency shows by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. 5 C.F.R. § 1209.7(a) and (b); McDaid v. Department of Housing and Urban Development, 46 M.S.P.R. 416, 420 (1990).
For the following reasons, I DISSMISS the appellant's IRA appeal.

ANALYSIS AND FINDINGS

Background

It is undisputed that the appellant prepared a memorandum dated July 3, 1990, addressed to Robert A. Maffitt, Director of Field Operations for OTS, criticizing supervisory officials in the Des Moines District Office for failing to approve a capitalization plan for the Marion County Mutual Loan and Building Association (MCM), a savings and loan association in Hannibal, Missouri. Appeal File (AF), Sealed Volume (SV) 1, Tab 1, Attachment to the appellant's appeal; Tab 2, Subtab Exhibit (Ex.) 8. [3] The appellant conceded that he mailed a copy of the foregoing letter to Bayard Plowman, Managing Officer of MCM, with a cover letter encouraging Plowman to send additional copies of the letter to his congressman (Harold A. Volkmer) and to the head of the House Banking Committee. Id. at Tab 1. The agency maintained that it removed the appellant from his position because his release of the foregoing document to Plowman violated the agency's standards of conduct by releasing confidential information to an individual not authorized to receive such information. The agency argued that the appellant's actions did not warrant protection under the Whistleblower Protection Act of 1989 (WPA) because his disclosure was not

---

1 See Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat. 16, July 9, 1989.

2 The Board republished its rules of practice and procedures on July 6, 1989, concerning IRA appeals. See Fed. Reg. 28,632-64 (July 6, 1989). These rules were later amended on July 12, 1990. See Fed. Reg. 28,591-95 (July 12, 1990).

3 At the agency's request and in compliance with the parties' agreed protective order, this office ordered that a portion of the appeal file be sealed due to the confidential nature of much of the material at issue in this appeal. See Appeal File (AF), Unsealed Volume (UV), Tab 11.

protected under the statute at 5 U.S.C. 2302(b) (8) because he could not have had a reasonable belief that OTS' actions violated the conditions listed in the statute. The agency also maintained that the disclosure was not protected under the WPA because the disclosure was specifically prohibited by law.

The appellant began his Federal service in 1977 as an Examiner with the Federal Home Loan Bank Board (FHLBB). He had risen to the level of GS-12 Examiner in 1985 when the FHLBB became an independent government corporation and its employees lost their status as Federal employees. The appellant had been in the competitive service while a Federal employee. He continued as a non-Federal employee with the Federal Home Loan Bank of Des Moines in its St. Louis Office. Pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Section 301, an amendment to the Homeowners Loan Act (HOLA), effective August 9, 1989, the FHLBB, for which the appellant's Federal Home Loan Bank of Des Moines performed examining functions, was abolished. See Pub. L. 101-73, Title IV, §§ 401-06, August 9, 1989, 103 Stat. 354-363.

Under FIRREA, the appropriate Directors and Chairpersons of the new oversight agencies described in section 403 determined the functions and activities and the number of employees from the FHLBB and FSLIC that were necessary to perform supporting functions and activities in the new agencies, including OTS. Pursuant to section 722(c) of FIRREA, the appellant, as an employee of a Federal Home Loan Bank, was entitled to be transferred to OTS and could not be involuntarily separated for one year after the date of the transfer, except for cause. Id. att Title VII, § 722, 103 Stat. 426. Effective October 8, 1989, the appellant became an employee of the OTS. AF, UV, Tab 25. The appellant was retained in that position until separated in July 1990, less than a year later.

<u>The appellant is not entitled to appeal his removal under 5 U.S.C. § 7511 or 5 C.F.R. § 351.901.</u>

The appellant maintained that the agency violated his due process rights when it failed to give him any procedural safeguards when effecting his removal. The appellant requested that the Board correct this alleged oversight. The agency maintained that the appellant was not entitled to appeal his removal

to the Board as its jurisdiction is limited.
Pursuant to 5 U.S.C. § 7511(a)(1), an employee who is entitled to appeal to the Board is defined as:

> (A) an individual in the competitive service -
>
> (i) who is not serving a probationary or trial period under an initial appointment; or
>
> (ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to one year or less;
>
> (B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions —
>
> (i) in an Executive agency; or
>
> (ii) in the United States Postal Service or Postal Rate Commission; and
>
> (C) an individual in the excepted service (other than a preference eligible)—
>
> (i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or
>
> (ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive Agency under other than a temporary appointment limited to 2 years or less;

The agency appointed the appellant to a position in the excepted service effective October 8, 1989. AF, UV, Tab 25; Tab 5, Subtab Ex. 3 and 4. The appellant argued that he had been in the competitive service prior to the reorganization when he was no longer considered a Federal employee as an employee of the Federal Home Loan Bank. He maintained that as such, he was entitled to return to a position in the competitive service. The appellant argued that OTS had no right to reinstate him as an excepted service employee because under 5 C.F.R. § 6.1(a), OTS had not demonstrated that his position of Examiner should have been one excepted from the competitive service. This was due to the fact that OTS had not shown that an appointment thereto through competitive examination was not practical.

Had the agency's proof demonstrated that the Office of Personnel Management (OPM) placed all positions of OTS in-

volved in the supervision of savings associations in the excepted service under schedule A as required by Civil Service Rule VI. See 5 C.F.R. Part 6; AF, UV, Tab 5, Subtab Ex. 5. OTS was directed by OPM that such excepted appointments could not be made after December 31, 1990, and should be cited under appointment authority 5 C.F.R. § 213.3105(d) (1) on personnel action forms. AF, UV, Tab 5, Subtab Ex. 3. Pursuant to 5 C.F.R. § 6.1(b), it is within OPM's discretion whether the duties of any particular position are such that it may be filled as an excepted position under the appropriate Schedule. Under 5 C.F.R. § 213.102, OPM shall decide whether the duties of any particular position are such that it may be filled as an excepted position in Schedule A, B, or C. Pursuant to specific authorization by OPM, agencies may then make the appointment. 5 C.F.R. § 213.3010.

Here, OTS appointed the appellant to the excepted service as authorized by OPM. Therefore, I find that he is not entitled to appeal to the Board under 5 U.S.C. § 7511(a) (1) (A) (i). Further, the appellant is not a preference eligible employee in the excepted service. AF, UV, Tab 25. Accordingly, I find that he is not entitled to appeal to the Board under 5 U.S.C. § 7511(a)(1)(B).

Pursuant to the Civil Service Due Process Amendments, Publ. L. 101-376, § 1, August 17, 1990, 104 Stat. 461, an individual in the excepted service, other than a preference eligible, who was not serving a probationary or trial period under an initial appointment pending conversion to the competitive service, is an employee entitled to appeal a removal to the Board. 5 U.S.C. § 7511(a) (1) (C) (i) (West Supp. 1990). Under § 2(a) of Pub. L. 101-376, the foregoing amendment is only applicable with respect to any personnel action taking effect on or after August 17, 1990. See 5 U.S.C. § 4303, Historical and Statutory Notes, § 2(c) of Pub. L. 101-376 (West. Supp. 1990). The appellant's removal was effective July 26, 1990. Accordingly, I find that he is not an employee entitled to appeal his removal under 5 U.S.C. § 7511(a) (1) (C). He is not entitled to appeal under any part of 5 U.S.C. § 7511.

The appellant contended that § 404 of FIRREA, "Rights of employees of abolished agencies.", entitles him to appeal to the Board under 5 U.S.C. § 351.901. This latter section is on OPM regulation which permits employees who have been either furloughed for more than 30 days, separated, or demoted by a

reduction-in-force (RIF) action, to appeal to the Board. The appellant noted that § 404(1) indicated that employees identified for transfer from the Federal Home Loan Bank to OTS should be deemed to have been affected by a transfer of function. Further, in § (2), each transferred employee is guaranteed a position at the same status, tenure, and pay as held on the day immediately preceding the transfer. Any such employee holding a permanent position should not be involuntary separated or reduced in grade or compensation for one year after the date of the transfer, except for cause. The appellant maintained that the foregoing established his right to contest the agency's basis for removing him within one year after his appointment into OTS.

Even assuming that the foregoing sections would allow a transferred employee to contest a removal to the Board as an appeal granted by reduction-in-force (RIF) regulations, I find that §§ 403 and 404 specifically excluded the appellant from coverage. In § 404, it is stated that: "all employees identified for transfer under subsection (b) of section 403 (other than individuals described in subsection (c) or (d) of such section shall be entitled to the following rights:" In § 403(c), employees of the Federal Home Loan Bank system are described. This was the appellant's former employer. Thus, he is specifically excluded by § 404 from entitlement to any rights of transfer being deemed a transfer of function.

Under § 722 of Title VII, Publ. L. 101-73(c), the appellant was entitled to a guaranteed position and to not be involuntarily separated until one year after the date of transfer, except for cause. This status, however, did not provide for any appeal rights to the Board concerning any ensuing separation. The appellant may be entitled to some form of fair administrative appeal under the due process clause of the Constitution. However, nothing in the Constitution mandates that such an appeal be to this Board. The Constitution therefore is of no benefit to the appellant on the threshold jurisdictional issue being addressed. See Smith v. Department of the Navy, 4 M.S.P.R. 20, 30 n.13 (1980). Since Congress has expressly limited the Board's jurisdiction to actions made appealable to it by any law, rule, or regulation, the appellant must seek his remedy under another provision. As a result, the appellant filed this IRA appeal.

The appellant failed to demonstrate that he made a protected disclosure to Congress.

Under 5 U.S.C. § 2302(b) (8), it is stated that any employee who has authority to take or direct others to take, recommend or approve any personnel action should not with respect to such authority:

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of

A)any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences–

(i) a violation of any law, rule, or regulation, or
(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs;

Such is a prohibited personnel practice.

The agency does not dispute that it removed the appellant because he sent a copy of the July 3, 1990, memorandum to Plowman. The question therefore is whether or not the appellant's distribution of the foregoing document constituted a protected disclosure under the WPA. First, it should be noted that the appellant contended that 5 U.S.C. § 2302(b) absolutely protects him because it states that:

> This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against a employee who discloses information to the Congress.

The appellant argues that his action releasing the copy of his memorandum to Plowman with the suggestion that Plowman share the document with his congressman and the head of the House Banking Committee constituted a disclosure of information to Congress which entitled him to protection from disciplinary action. I disagree.

The appellant testified that he did not share his letter with any congressman. Hearing Tape 1 (HT), Side A. Plowman was the person who disclosed the information to his congressman and to the head of the House Banking Committee. Plowman did not have to do so. He was not acting as an agent for the appellant. As Managing Officer of the savings and loan association under fire for failing to meet capital requirements, Plowman was seeking assistance from his elected representative possibly to forestall a merger or other apparently unsatisfactory actions by OTS. The appellant testified that he did not really think that Plowman was going to follow his suggestion that he share his memorandum with his congressman. He thought this because Plowman earlier had advised him not to write such a memorandum because the appellant would be getting himself into trouble by disagreeing with his superiors. HT 1, Side A.

I do not find that Plowman's disclosure to his congressman protects the appellant under the provision at 5 U.S.C. § 2302(b). Moreover, the agency did not take the action against the appellant because of a disclosure to a congressman. It took the action because of the disclosure to the officer of the savings and loan association which was under the supervision of OTS. Therefore, the appellant would not be protected even if one considers his release of the information to Plowman to be a disclosure to Congress.

The appellant failed to demonstrate that he made a protected disclosure under the WPA.

Although he did not make a disclosure to the Congress, the appellant did make a disclosure of information to Plowman. In McDaid v. Department of Housing and Urban Development, 46 M.S.P.R. at 421, the Board held that any disclosures which the employee "reasonably believes evidence a violation of" any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety, if such disclosure is not specifically prohibited by law, are protected by the WPA. See 5 U.S.C. § 2302(b) (8) (A) (i) and (ii). To establish a prima facie case of reprisal for whistleblowing, an appellant must demonstrate that his disclosure is covered by 5 U.S.C. § 2303(b) (8) and that it was a contributing factor in his removal. 5 U.S.C. § 1221(a) (1); 5 C.F.R. § 1209.7(a) ;Gergick v. General Services Administration, 43

M.S.P.R. 651, 659 (1990). The legislative history of the WPA indicates that disclosures are to be encouraged. Any disclosure is protected if it meets the requisite reasonable belief test and is not required to be kept confidential. S. Rep. No. 413, 100 Cong., 2d Sess. 13 (1988). [4]

In Ramos v. Federal Aviation Administration, 4 M.S.P.R. 388, 392 (1980), a case arising before the WPA was enacted amending 5 U.S.C. § 2302 (b) (8), the Board held that where an appellant had claimed that reprisal had been taken against him for disclosure of information, the employee need not demonstrate that a violation of a law, rule, or regulation, or one of the other conditions specified in § 2302 (b) (8) actually occurred or existed. He need only show that the condition which he reported was one which he reasonably believed constituted one of the situations so specified in the statute. According to the Board, such a showing may be made by establishing that the condition existed and that such condition was known to and reported by the employee. The Board has also noted that such evidence must be sufficient to show that a reasonable person in his position would believe that the matter he disclosed evidenced any of the situations specified in 5 U.S.C. § 2302(b) (8). See Special Counsel v. Hoban, 24 M.S.P.R. 154, 160 (1984).

The appellant maintained that he had a reasonable belief in his assertions of agency improprieties. Further, he noted that the actual correctness of any disclosure did not affect whether his disclosure was protected. See S. Rep. No. 413 at 12; AF, SV 1, Tab 1, Attachments to Appeal; Tab 5, Appellant's Closing Argument. Before determining whether the appellant had a reasonable belief that his disclosures evidenced some violation, his memorandum should first be reviewed to determine what in fact the appellant was claiming. AF, SV 1, Tab 2, Subtab Ex. 8.

In the memorandum directed to Maffitt, Director of Field Operations, the appellant stated that:

> I am writing this memorandum to protest the unnecessarily arbitrary treatment of Marion County Mutual Loan and Building Association of Hannibal, Missouri by the supervisory authorities of the Office of Thrift Supervision.

Id. The appellant then stated that he believed his 13 years of experience as an Examiner with OTS and its predecessor agency

[4] If the disclosure at issue is "specifically prohibited by law" it must be made to the special council or the Inspector General or other desrnated employee of an agency in order to qualify for protection. 5c.f.r.§1209.5(b)(2).

put him in a better position to evaluate MCM's prospects for surviving than any other OTS employee. The appellant discussed MCM's financial history.

He claimed that MCM had been consistently profitable since 1986 and that its generally accepted accounting procedure (GAAP) net worth had increased to -$3,000 (a minus) on May 31, 1990, and was expected to become positive in June 1990. Despite this progress and the current projection of GAAP net worth to increase by the end of 1994, the appellant conceded that MCM would not be able to meet the tougher capital requirements mandated by the FIRREA legislation. The appellant indicated that because of the inadequate capital level MCM was required to submit a capital plan to the OTS which demonstrated its ability to meet all core capital requirements by the end of 1994.

According to the appellant's memorandum, MCM planned to eliminate its capital deficiency through a public stock offering. OTS notified MCM in a letter dated April 30, 1990, that its proposed stock offering was not considered feasible and the capital plan was not accepted. The appellant further expressed his view that the rejection of the capital plan by OTS created a situation in which the MCM Board of Directors and Management team were in immediate danger of having control of the association taken away from the. He noted that the Board of Directors had been asked to approve a consent agreement which would give OTS the authority to remove them and the management team or to merge the association with another institution an any time.

The appellant further discussed OTS' rejection of the capital plan. He noted that it was rejected because of the concern with the marketability of the stock conversion. The appellant conceded:

I do not object to the OTS' reluctance to permit Marion County to risk the $200,000 required to underwrite a stock conversion. This expense would likely have to be absorbed by the insurance fund in the event the offering was not successful. Marion County's current low level of GAAP capital and its marginal net income during recent quarters could certainly reduce the appeal of its stock to the investing public. What I do object to most strenuously is the necessity of removing the board of

> directors (sic) and management that has performed so well from an institution for which the prospects are so favorable.

Id. The appellant then went on to state various favorable financial factors concerning MCM. He concluded that MCM was solvent, its GAAP net worth would become positive in June 1990 and was projected to increase to a substantial figure of $1,000,000 by the end of 1994. In addition, the appellant indicated that MCM held net worth certificated totaling 1.05 million dollars. He claimed that MCM did not present any risk to the insurance fund nor did it have an excessive exposure to interest rate risk. He pointed out that management of MCM had been competent, cooperative, and responsible for the improvement in the savings and loan. Further, the appellant stated that MCM should be able to complete a stock conversion by 1994, especially if increases in GAAP capital projected in the capital plan were achieved over the succeeding four years.

The appellant emphasized again that he believed the prospect of removal of MCM's Board of Directors and management team was "plainly wrong." He believed that there should be alternative to taking the control from these people. He said such would result in a tragedy to the Hannibal area. He noted that the Hannibal area had a housing stock which was functionally obsolete because of lack of first-floor bathrooms or driveways that open to the street. As a result, there remained only three lending institutions in the Hannibal area that were willing to grant home loans for any property in Hannibal. The appellant complained that if MCM was merged with a statewide institution such as Roosevelt Federal Savings and Loan Association, a two billion dollar St. Louis-based institution, which already had a 40 million dollar branch office in Hannibal, then the source of home financing would be restricted even more. He noted that the Roosevelt Bank had closed very few loans in the Hannibal area since it took control of an ailing association in 1981.

The appellant went on to praise MCM's Managing Officer and suggested that OTS give MCM a fair shake by doing several things. These included: permitting MCM to proceed with the stock offering if sufficient safeguard were established to reduce the risk exposure on the insurance fund; approving a capital exemption as outlined in OTS' Thrift Bulletin (TB) 36A that would permit MCM to postpone its stock offering until 1994;

approving a capital exemption that would permit MCM to meet FIRREA capital requirements solely by the retention of earnings; forgiving an accrued interest payable of $591,000 on net worth certificates owed to the insurance fund; and by restructuring MCM's net worth certificates so that is may qualify the holding as core capital.
Id. A thorough review of the appellant's disclosure demonstrates that he was actually expressing his disagreement with the rejection of the capital plan. This rejection prompted OTS' request for MCM to sign a consent agreement which could result in the removal of the Board of Directors and managing officers at MCM. In his IRA, the appellant maintained that the rejection of the capital plan by OTS evidenced a violation of FIRREA's provisions because MCM's financial status was one which met all the requirements for an exemption from achieving the capital standard required by FIRREA as set out as 12 U.S.C. § 1464 (T) (7) (c) (i).

The appellant argued that OTS should have approved an exemption thus limiting the only sanction or penalty for failure to comply with capital standard to a limited growth. The limitation is set out in paragraph 6(B) or 6(C) whichever is applicable. The appellant maintained that § 1464 (T) (7) (C) (i) provides that the Director of OTS may approve an application for an exemption if the Director determines that: (I) such exemption will pose no significant risk to the affected deposit insurance fund; (II) the savings association's management is competent; (III) the saving association is in substantial compliance with all applicable statutes, regulations, order, and supervisory agreements and directives; and (IV) the savings association's management is not engaged in any insider dealing, speculative practices, or any other activities that may jeopardize the association's safety and soundness or contributed to impairing the association's capital. According to the appellant, the foregoing is in effect, a requirement that the director grant an exemption from the capital standards. Further, with that exemption, the appellant maintains that he believes that MCM should have been considered as having an acceptable capital plan.

After careful consideration of the record in this case, I find the appellant's argument to be unpersuasive.

In pertinent part, 12 U.S.C. § 1464(s) (4) (A) provides:

> In addition to any other action authorized by law, the Director may issue a directive requiring any savings association which fails to maintain capital at or above the minimum level required by the Director to submit and adhere to a plan for increasing capital which is acceptable to the Director.

Under 12 U.S.C. § 1464(t) (6) (A) (ii), the Director can require any savings association in noncompliance with capital standards to submit a plan that (I) addresses the savings association's need for increased capital; (II) describes the manner in which the savings association will increase its capital so as to achieve compliance with capital standards; (III) specifies the type and levels of activities in which the savings association will engage; (IV) requires any increase in assets to be accompanied by an increase in tangible capital not less in percentage amount than the leverage limit then applicable; (V) requires any increase in assets to be accompanied by an increase in capital not less in percentage amount than required under the risk-based capital standard then applicable; and (VI) is acceptable to the Director.

The agency issued guidelines for FIRREA capital plans, exemptions, and exceptions in documents entitled "Thrift Bulletins" (TB). The bulletins in effect at the time the MCM submitted its capital plan was TB 36. AF, SV 4, App. Ex FF. In those guidelines, OTS informed the associations that any savings association in noncompliance with all the capital standards will be considered an association which requires more than normal supervision, will be deemed to fail its minimum capital requirements and shall not, without the prior written approval of its District Director: (1) grow beyond net interest credit, (2) make any capital distributions, (3) act inconsistently with any applicable operating restriction and limitations, including restrictions imposed by the District Director, under current delegation of authority. For purposes of this agency bulletin, an association is considered to require more than normal supervision if it fails any one of its minimum capital requirements, has a macro rating of 4 or 5, or is otherwise identified as in need of more than normal supervision by supervisory personnel.

TB 36 required that a savings and loan association that fails either one of the capital standards shall submit a capital

plan and may apply for a limited capital exception, an exemption from a supervisory sanction or restriction, or a limited growth exception. Further with regard to an acceptable capital plan, the bulletin indicated that any savings association not in compliance with the capital standards shall have sixty days from the promulgation of the capital regulation (or the date that the savings association falls out of compliance with the capital standard) to submit a capital plan to the District Director. The savings association which then files and adheres to a capital plan that is acceptable to the District Director and receives approval of a capital exception or exemption is deemed to be in compliance with the capital standards.

The savings association may apply to the District Director for an exemption from a capital directive or specific sanctions and penalties imposed upon the savings association for failure to comply with its minimum capital standards. The savings association which then files and adheres to a capital plan that is acceptable to the District Director and receives approval of a capital exception or exemption is deemed to be in compliance with the capital standards.The savings association may apply to the District Director for an exemption from a capital directive or specific sanctions and penalties imposed upon the savings association for failure to comply with its minimum capital standards. The savings association that receives approval of a capital exemption and operates in accordance with an acceptable capital plan will require more than normal supervision, but will be deemed to be in compliance with the capital standards only for the purposes of the capital regulations. The savings association must request and receive approval of specific expressed exemptions from the provisions of rules, regulations, policy statements as part of the accepted capital plan to be deemed in capital compliance for purposes of such other rules, regulations, and policy statements.

Notwithstanding an approval for a capital exemption, all asset growth restrictions shall apply unless such approval specifically states otherwise. Pursuant to 12 U.S.C. § 1464 5(t) (7) (C) (i), the Director of OTS may approve an application for a capital exemption if the certain conditions detailed supra are met. Any application for a capital exemption must be accompanied by an acceptable capital plan. *Id.* At the time MCM's capital plan was

rejected, Thrift Bulletin 36a (TB 36a) had been published. Id. atUV, Tab 5, Subtab Ex. 10. That document states that the District Director has delegated authority to deny or approve a capital plan. Further, an application for an exemption must be accompanied by a capital plan acceptable to the District Director. As noted on page 6 of the guidelines in TB 36a at paragraph 6, an exception to a capital plan does not preclude the Director of OTS, or his designee from taking any risk to the safety or soundness of the association or insurance fund. Such events or circumstances may include (1) the failure of the savings association to comply with the capital plan; (2) internal or external factors that invalidate material assumptions of the capital plan, or (3) factors that adversely affect material assumptions in the capital plan, thereby causing the viability of the capital raising strategies or other significant provisions of the plan to be clearly unrealistic.

On page 7 of TB 36a the guidelines note that the capital plan process is a statutory requirement relating to capital noncompliance and as such the nature of the filing and the process relate to the supervisory and enforcement authority of OTS. Filings that relate to enforcement and supervisory authority of the OTS were specifically excluded from the scope of the regulations in order to ensure that OTS retain flexibility in exercising its enforcement and supervisory authority. Id.

On April 30, 1990, the Deputy District Director, Harlan G. Halsne, notified MCM that its capital plan was rejected. Id. at SV 2, Ag. Ex. 2. Halsne discussed the reasons for the denial of MCM's plan.

In pertinent part, he determined that the MCM's capital plan did not adequately comply with the requirements of the applicable regulations. Further, the strategy of completing a conventional stock conversion was not supported in the plan as it contained little information pertaining to the institution's market value and the institution's desirability in the market. In addition, after reviewing the plan and the institution's present condition, the conventional stock conversion did not appear feasible due to the following reasons: (1) MCM had negligible GAAP net worth; (2) MCM realized a $8,000 net loss in 1989; (3) MCM would be trying to market stock to the public which would not provide dividends until MCM met capital requirements, which appeared to be a approximately three years or more in the

future.

Halsne concluded that given the unknown as well as all the known factors which detract from the marketability of a conventional stock conversion, it would be a poor management decision to expend the $200,000 that had been estimated to complete a conventional stock conversion. In addition, given that the institution is insolvent according to GAAP, the amount spent on a conversion would be a direct exposure to the insurance fund should the stock conversion fail and would therefore impose a significant risk to the insurance fund. *I.d*

In addition, OTS determined that MCM's backup modified plan, which consisted of a proposal to convert outstanding net worth certificates into an instrument qualifying for tangible core capital and obtaining a resolution of the outstanding accrued interest payable, did not appear feasible.

The Federal Deposit Insurance Corporation (FDIC), through its Financial Assistance Division (FAD), which engages in the operations of the former FSLIC, considered MCM's proposal but informed OTS that the FDIC did not intend to act on it. Id. at SV 1, Tab 2, Subtab Ex. 11. Thus, OTS concluded that MCM would be unable to achieve capital compliance through these means. *Id.* at SV 2, Ag. Ex. 2.

I conclude that it was not reasonable for the appellant, an experienced examiner of savings associations, to believe that OTS's rejection of MCM's capital plan was a violation of FIRREA or the regulations implementing the statute.

The statute is specific that the required capital plan for increasing capital must be acceptable to the Director. There is no standard under FIRREA requiring approval of a capital plan for an association which fails to comply with capital standards. An exemption was sought by MCM and it was turned down as well. However, under 12 U.S.C. § 1464(t) (7) (d), the exemption application itself had to have a plan which was acceptable to the Director under 12 U.S.C. § 1464 (a), the Director of OTS was authorized to provide for the organization, incorporation, examination, operation, and regulation of the associations to be known as the Federal saving associations to be known as the Federal savings associations and to issue charters therefor, giving primary consideration of the best practices of thrift institutions in the United States. The lending and investment powers

conferred by the statute were intended to encourage such institutions to provide credit for housing safely and soundly (emphasis added). Based on this authority indicated in the statute, I do not find that the appellant, an Examiner with OTS for approximately nine months when he made his disclosure (but an Examiner for 13 years in total), reasonably believed that OTS; action rejecting MCM's capital plan was a violation of the FIRREA statute.

The appellant failed to demonstrate that he reasonably believed that OTS had violated the Community Reinvestment Act (CRA) of 1977.

The appellant also claimed that because he believed that OTS was on the verge of merging MCM with Roosevelt Federal, his disclosure challenging such an event was protected as evidence of a violation of law. He contended that Roosevelt Federal had such a poor loan record in the Hannibal area that he had a reasonable belief that the CRA was soon to be violated. The foregoing law, at 12 U.S.C § 2901(b), requires the appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the "safe and sound operation of such institutions." Accordingly, the appellant maintained that by raising Roosevelt's purported noncompliance with CRA when it was being considered as a possible merger partner of MCM, he had a reasonable belief that such a merger would violate a law. Thus, his disclosure was protected under the WPA.

I find that the appellant's contention in this regard is likewise unpersuasive. The appellant testified that OTS could not violate the CRA as that statute is written. HT 3, Side A. Maffitt Testified that the CRA only requires that OTS give consideration to a potential buyer's compliance with CRA provisions. HT 6, Side B; HT 8, Side A. Maffitt noted that there had been no application for a merger with MCM by Roosevelt Federal and therefore no such consideration was necessary to be given at the time the appellant made his disclosure to Plowman.

The agency presented evidence that OTS had considered Roosevelt Federal's compliance with the CRA in another transaction upon which OTS had to rule. See AF, SV 3, Ag. Ex. 1. In addition, the agency presented proof that Maffitt concurred

with Examiner Gassert's recommendation that Roosevelt's purported noncompliance with the CRA be taken into consideration. Id. At Ag. Ex. 5. In a report prepared by Nicki Harrison, Maffitt's assistant on June 28, 1990, she indicated that she spoke with Examiner Gassert regarding the examination of MCM currently in progress. Ms. Gassert advised Harrison that Roosevelt Federal had been poorly rated with regard to the CRA in the Hannibal area. Gassert then suggested that OTS consider that fact when reviewing the possibilities of merging MCM with another entity. Maffitt indicated his agreement with Gassert by entering his "OK" on Ms. Harrison's report. *Id.*

The appellant testified that he had spoken to Gassert prior to his preparation of the July 3, 1990, letter. HT 2, Side B. Although the appellant may have had a reasonable belief that Roosevelt Federal had not been making many loans in the Hannibal area, I do not find that the appellant had a reasonable belief, based on what he knew at the time, that OTS would not follow its requirement to encourage financial institutions to help meet the credit needs in a local community. There were more than one potential merger partners with MCM at the time the appellant wrote his letter. He was merely speculating that Roosevelt would make an application for a merger and then that application be approved and accepted by OTS. Roosevelt never made such an application. The appellant conceded that he had no knowledge of the merger process which Roosevelt would have had to follow in order to acquire MCM. HT 3, Side A. As noted supra, the agency submitted proof that it had considered Roosevelt's compliance with the CRA in a previous merger. Conditional approval was granted. AF, SV 2, Ag. Ex 1 and 3. The appellant had no reasonable basis to conclude that Roosevelt would be the entity that would merge with MCM or that OTS would not proceed in accordance with its responsibilities under the CRA.

As noted in App. Ex K, the purpose of the CRA was to encourage each financial institution to help meet credit needs of the community in which it operates. The Act requires that in-connection with its examination of a financial institution, each Federal financial supervisory agency shall (1) assess the institution's record of helping to meet the credit needs of its entire community, including low and moderate-income neigh-

borhoods, consistent with the safe and sound operation of such institution, and (2) take such record of performance into account when deciding whether to approve an application of the institution for a deposit facility. 12 U.S.C. § 2903. FIRREA amended the CRA to require the agency to make public certain portions of their CRA performance assessments of financial institutions. Although it was clear in the assessment of Roosevelt Federal in 1989 that the institution needed to improve, OTS did in fact make its approval of Roosevelt's merger with Home Federal Savings in Alton, Illinois, contingent on certain conditions such as a three-year CRA strategic plan with implementation goals, the establishment of community advisory committee, and a senior CRA policy committee. AF, SV 2, Ag. Ex. 1.

The appellant, if he was not aware of OTS' demands upon Roosevelt Federal for implementation of the CRA strategic plan, very well should have had knowledge of them. This is so since in the compliance examination of Roosevelt dated October 25, 1989, wherein the majority of the interviews and telephone contacts were made in the OTS' St. Louis Office, the Executive Vice President of Roosevelt Federal indicated the bank's determination to develop and to increase its efforts to make more loans in the Hannibal area. *Id.* at SV 1, App. Ex. L. This exhibit demonstrates OTS' continued efforts to ensure compliance with CRA by acquisition applicants. The appellant had worked in the St. Louis office examining the savings associations for years. He was on board with OTS when the foregoing examination concluded. He would have had some knowledge of his office's requirements for acquisition applicants. Thus, I find that the appellant knew or should have known of Roosevelt's stated efforts to increase lending activities in the Hannibal area. Accordingly, I find that a reasonable person with the appellant's experience and knowledge could not have believed that OTS was violating a law. Further, I find that the appellant's speculation does not constitute a reasonable belief such as to warrant protection under the WPA.

<u>The appellant failed to demonstrate that he had a reasonable belief that the agency abused its authority, engaged in gross mismanagement, expended a gross waste of funds, or was a substantial and specific danger to public health or safety.</u>

The appellant also maintained that his explanation in his

July 3, 1990, memorandum concerning the rejection of MCM's capital plan was evidence of gross mismanagement, a gross waste of funds, a significant and a substantial danger to public health and safety, and an abuse of authority. Likewise, I find these appellant's claims unpersuasive.

The appellant conceded in his July 3, 1990, memorandum which he sent to Maffitt, a copy of which he sent to Plowman without advising anyone, that he did not disagree with OTS' decision not to allow MCM to risk $200,000 to underwrite the stock conversion because the insurance fund would most likely have to absorb it if the offering was not successful. Clearly, the appellant was merely disagreeing with his superiors' discretionary powers to ensure solvency and compliance with statutory capital standards. The appellant has not demonstrated he could reasonably believe that there was gross mismanagement.

The appellant spoke to Ms. Gassert and Plowman before he wrote his memo. He should have been aware, as Ms. Gassert determined in her examination in June 1990, that MCM knew as on June 27, 1990, that the positive earnings projected by MCM were "too little and too late" to recapitalize the association. *Id.* at App. Ex. Q.

Further, the capital standards were all deficient as of 5/31/90. The composite rating, although listed on the interoffice memo prepared by Gassert as a 3 was corrected to reflect that it should have been a 5. *Id.; Id.* at Ag. Ex. 5. Under the District guidelines for Macro ratings analysis, a rating of 5 would indicate a level of serious concern due to the institution's failing all three of the capital requirements and not being capable of developing a capital plan which would reflect further compliance with all three capital requirements. *Id.* at Ap. Ex. N.

As Gassert testified at the hearing, MCM was insolvent although it was making a slight profit at the time of the examination in June 1990. HT 5, Side A. Based on my review of the foregoing, I cannot find that the appellant has demonstrated that he could reasonably believe that OTS was guilty of gross mismanagement.

The appellant also contended that he demonstrated a reasonable belief that OTS' actions evidenced a gross waste of funds. His claim is contingent upon the premise that if a merger of MCM had occurred it would have reflected a gross waste of

OTS' funds because, according to the appellant, such a merger would have been unnecessary. Well, no merger took place. MCM was able to revise its capital plan, essentially by Managing Officer Plowman's agreement to put up his own money to cover the cost of a unsuccessful stock conversion, to make acceptable to OTS.

Maffitt had advised Plowman in a telephone call on June 29, 1990, that if Plowman was able to propose something with good possibilities, OTS would work with him. In addition Maffitt advised them that the net worth certificates conversion with FDIC could be reconsidered. Such a forbearance by Maffitt had been also indicated to MCM's attorney, Allen D. Housley, Washington, D.C. *Id.* at Ag. Ex. 6. The appellant testified that he had not talked to any of his supervisors concerning MCM's capital plan prior to is rejection. HT 2, Side B, HT 3, Side A. He just proceeded to write up his letter expressing disagreement with his superiors' actions. I do not find these circumstances, after what was plainly a lack of effort and inquiry on the appellant's part to learn the true entire facts governing the situation, demonstrate a reasonable basis for him to believe that the agency was going to commit a gross waste of funds in the future. Therefore, the appellant has failed to demonstrate that he reasonably believed that the agency would commit a gross waste of funds.

The appellant contended that his disclosure evidenced a substantial and specific danger to public health or safety. He maintained that merging MCM with a lending institution like Roosevelt Federal, which did not make many loans, endangered the public. He contended that the community would be endangered by the abandoned, unoccupied homes which would not be purchased. I do not find that the appellant's concern with the number of home loans in the Hannibal area is the sort of information which one would reasonably believe evidences a substantial and specific danger to public health or safety as contemplated by § 2302(b) (8).

In Prescott v. Department of Health and Human Service, National Institute of Child Health and Development, 6 M.S.P.R. 252, 258 (1981), the Board, while discussing a type of protected disclosure of public health and safety issues which are both substantial and specific, referenced the legislative history of 5 U.S.C. § 2302(b) (8) when first enacted. See S. Rep. No. 95-969,

95th Cong., 2d Sess. 21, reprinted in [1978] U.S. Code Cong & Admin. News 2723, 2743. The Board noted that the legislative history provided:

> Thus, for example, general criticism by an employee of the Environmental Protection Agency that the agency is not doing enough to protect the environment would not be protected under this subsection. However, an allegation by a Nuclear Regulatory Commission engineer that the cooling sytem of a nuclear reactor is inadequate will fall within the whistleblower protections.

Id. I find that the appellant's claim of danger because of fewer home loans in the Hannibal area is the type of general criticism which does not give rise to a finding by the Board that the appellant reasonably believed that a substantial and specific danger existed as to the public health and safety. Prescott v. Department of Health and Human Services, 6 M.S.P.R. at 259.

The appellant claimed that, at the least, the agency abused its authority in its actions dealing with the MCM. As noted supra, FIRREA granted the OTS' Director quite a bit of discretion in determining whether to approve a savings association's capital plan. The appellant has to demonstrate that the agency's actions were an abuse of this discretion.

As defined in Black's Law Dictionary 25 (4th. Ed. 1968), an abuse of discretion is "synonymous with a failure to exercise a sound, reasonable, and legal discretion." This abuse means the clearly erroneous conclusion and judgment, i.e., one that "is clearly against logic and effect of such facts as are presented in support of the application of against reasonable and probable deductions to be drawn from the facts disclosed upon the hearing." *Id.*

Per my discussions of the rejection of MCM's capital plan by OTS, I cannot find that the agency's action was clearly against reason and the evidence. I further find that the appellant, as an experienced examiner of savings associations, failed to demonstrate that he could reasonably believe that OTS abused its authority.

The appellant contended that Maffitt abused his authority by attempting to remove Plowman as MCM's Managing Officer. The record reflects that Maffitt essentially considered MCM's management to be competent but "lackluster. Maffitt,

however, was not alone in his determination that MCM's capital plan was inadequate. He sought advice from OTS headquarters in Washington, D.C. He communicated with Ed McQuown who basically concurred with Maffitt's estimation of MCM's failure to present an acceptable capital plan. AF, SV 2, App. Ex. E; SV 4, App. Ex DDD. McQuown also spoke to Tim O'Leary, who worked in Maffitt's office. This occurred on March 9, 1990. O'Leary indicated that McQuown likewise agreed that because MCM had no capital, no core earnings and no committed purchasers of stock, the stock offering was a likely failure. Therefore, the Headquarters office would lean toward rejection of the plan. Id. at Ap. Ex. G. The fact that the appellant himself considered the plan risky unless there were some substantial safeguards likewise belies the appellant's claim that he believed the agency had abused its authority in the instant matter.

In Berg v. LA Crosse Corp. Co, 612 F. 2d 1041, 1045-45 (7th. Cir. 1980), the court held that the employee had a reasonable belief that a violation of law occurred because the belief coincided with all the courts of appeals that had decided the question, the EEOC guidelines, three Justices of the Supreme Court, and with Congress.

In the instant case, the appellant's belief that OTS committed an abuse of authority or a violation of law only coincided with the opinion of the MCM party in interest and with that of a congressman who had obtained his information from that same MCM party. [5]

> In App. Ex. KK, which is an excerpt from the Congressional Record, August 3, 1989, at H 4982, it is stated that:
> The conferees agree that tough but fair and workable capital standards were absolutely essential to the success of this overall effort. Nearly two-thirds of the thrift industry already meet these standards but the remainder needed to be forced to meet the same standards or forfeit the right to operate as a thrift.
>
> * * *
>
> Through the efforts of many, those thrifts which fail to comply with the standard will, unlike in previous cases, be permitted to continue to operate. There are very specific conditions provided to the regulators which must

[5] I have considered Congressman Harold A. Volkmer's affidavit which was submitted by the appellant. AF, UV, Tab 27. However, I do not find his opinion that the appellant's disclosure was one intended by the WPA as dispositive.

> be met before a profitable, well managed thrift can be placed under supervision. And the thrifts themselves must present a business plan which outlines how they intend to reach the capital standards.

Rather than demonstrating that the legislative history coincides with the appellant's contention in the instant case, I note that the foregoing correlates to a greater extent with the agency's consistent contention that a capital plan which outlines how the savings association intends to reach capital standards is a must.

I also note that in H.R. Report No. 54, 101st Cong., 1st Sess., pt. 1 at 428 (1989), it was reported concerning a capital impairment provision of FIRREA that:

> The purpose of this provision is to affirm that (the OTS has) the authority to establish among other things, a universally-applicable floor capital requirement greater than zero below which an institution may be determined to be operating in unsafe or unsound condition to transact business. It is the Committee's belief that the ability to take such action may enable the regulators to intervene prior to an institution's insolvency and thereby preserve the resources of the insurance funds. Moreover, this provision gives the appropriate regulator discretion to appoint a conservator or receiver for an institution based on those criteria on a case by case basis.
>
> * * *
>
> [T]he committee believes that it is essential that the appropriate Federal banking agencies have clear authority to determine when conditions such as substantially insufficient capital constitute an unsafe and unsound condition...(emphasis added)

Id. at App. Ex NN.

I do not find that an experienced examiner with the appellant's knowledge of MCM's financial history could reasonably believe that OTS' supervision of MCM constituted an abuse of authority or any of the other specific conditions in 5 U.S.C. § 2302(b) (8). Accordingly, I find that the appellant has failed to establish a prima facie case that his removal from the agency was

due to reprisal against him for having made a disclosure protected under the WPA.

The appellant's constitutional challenge to FIRREA is not reviewable by the Board.

The appellant argued that he knew that the agency's rejection of the capital plan under FIRREA denied MCM due process and constituted a taking of property without compensation in violation of the Constitution. I note that the appellant's challenge on behalf of MCM to an alleged constitutional violation by OTS is not within the Board's purview. It is well settled that an administrative agency is without authority to determine the constitutionality of a statute. See Malone v. Department of Justice, 14 M.S.P.R. 403, 406 (1983). Assuming arguendo that the appellant's constitutional challenge was not directed at FIRREA but rather at the agency's application of its own procedures implementing the foregoing statute, I likewise find that the appellant has not raised an alleged claim of a violation of law protected under the WPA. His contention was that due to the rejection of the capital plan, OTS could force MCM to sign a consent agreement which would allow removal of the Board of Directors and Managing Officer. The appellant asserts that this would be an unconstitutional taking of property by OTS.

MCM did sign a consent agreement after its capital plan was rejected. AF, SV 1, Tab 1, Subtab, Ex. 7. This was on July 23, 1990, after the appellant's purported whistleblowing. I cannot find that a reasonable person could conclude that OTS had been involved in an unconstitutional, hence an unlawful, taking of property from MCM when it was asked by OTS to sign a "consent agreement." As noted in the agreement, MCM "consented" to the terms of the agreement as a valid and binding obligation.

MCM's Board of Directors passed a resolution admitting that (a) MCM had insufficient capital, (b) its capital plan had been rejected and (c) grounds existed for appointment of a conservator or receiver under HOLA, as amended by FIRREA. *Id.* The Board of Directors then also agreed to enter into the proposed "consent agreement" which was executed on July 23. The appellant argued that OTS' proposing a consent agreement was tantamount to forcing MCM to either sign or to go into conservatorship. This latter prospect, however, likewise would not be an indication of a violation of law because FIRREA

specifically provides for such an action by OTS. 12 U.S.C. § 1464(d) (2) (A). Moreover, MCM, if affected negatively by OTS' action, would then have had the right to seek judicial review of an appointment of a conservator. 12 U.S.C. § 1464(d) (2) (E). It cannot be concluded that an experienced examiner like the appellant was unaware of the foregoing provisions and therefore reasonably believed that there was an unlawful taking of property from MCM.

Because the appellant did not make out a prima facie case of reprisal from whistleblowing (since he failed to establish that his disclosure were covered by 5 U.S.C. § 2302(b) (8) (a) (i) and (ii)), I find that it is unnecessary to consider whether the agency would have removed him in the absence of a disclosure. Gergick v. General Services Administration, 43 M.S.P.R. at 659. [6]

Thus, I do not find that the appellant has demonstrated that he had a reasonable belief that the agency abused its authority, violated a law, rule, or regulation, was guilty of gross mismanagement, a gross waste of funds, or causing a substantial and specific danger in this case. The appellant's failure to demonstrate a prima facie case by showing that he made a protected disclosure requires dismissal of his request for corrective action.

DECISION

The appeal is DISMISSED.
FOR THE BOARD:

T. Christopher Heavrin
Administrative Hudge

NOTICE TO APPELLANT

This initial decision will become final on July 9, 1991, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court.

[6] Because I have found that the appellant had no reasonable belief that he had made a protected disclosure, it is unnecessary to determine whether or not his disclosure was specifically prohibited by law.

These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

United States Court of Appeal for the Federal Circuit

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the PETITIONER, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED, and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is DECLINED.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: December 2, 1992 By,_____
Diane M. Frye
Chief Deputy Clerk

cc: SAMUEL H. LIBERMAN
ALLEN D. BRUNS
HALEY V TREASURY, 92-3077
(MSPB - SL122191W0098)

Note: Pursuant to Fed. Cir. R. 47.8, this order is not citable as precedent. It is a public record.

To: Robert A. Maffitt
Director-FieldOperations
From: Michael J. Haley
Senior Examiner

Date: July 3, 1990

Subject: Marion County Mutual Loan and Building Association
Hannibal, Missouri
Docket No. 5608

I am writing this memorandum to protest the unnecessarily arbitrary treatment of Marion County Mutual Loan and Building Association of Hannibal, Missouri by the supervisory authorities of the Office of Thrift Supervision. I have been an examiner with the OTS and its predecessor agency, the Federal Home Loan Bank Board, for 13 years and have grown very familiar with Marion County since first conducting an examination of it in 1981. As a result of my long experience with Marion County, I believe I am better positioned to evaluate its prospects for survival than any other OTS employee.

Marion County is a traditional savings and loan association with total assets of $63 million. Its current regulatory problems stem solely from the 1981-82 interest rate crunch and the negative spreads experienced by much of the savings and loan industry during this period. As a result of operating losses that were incurred from 1981 to 1985, Marion County's GAAP net worth was reduced to approximately -$700,000. Marion County has been able to report positive RAP net worth through the issuance of Net Worth Certificates which now total $1,050,000. Despite Marion County's weakened financial condition, its management refrained from the speculative risk-taking engaged in by other savings associations during the 1980s and continued its traditional home mortgage and consumer lending activities. As a result, Marion County has been consistently profitable since 1986. Its GAAP net worth had increased to -$3,000 on May 31, 1990 and is expected to become postive in June 1990. Net income of approximately $1.0 million is currently projected for the 5 years ending December 31, 1994.

Despite the progress of the past 4 years and the continuing

progress projected for the next 5 years, Marion County will not be able to meet the toughened capital requirements mandated by the FIRREA legislation. Marion County is projected to have core capital of $1.0 million and risk-based capital (including Net Worth Certificates) of $2.1 million at the end of 1994. However Marion County's core and risk-based capital requirements are projected to be $1.9 million and $2.5 million, respectively. As a result, Marion County will fail the core capital requirement by $900,000 and the risk-based capital requirement by $400,000 on December 31, 1994.

Because of its inadequate capital level, in January 1990 Marion County was required to submit a capital plan to the OTS which would demonstrate its ability to meet all FIRREA capital requirements by the end of 1994. Marion County proposed to eliminate the capital deficiency through a public stock offering. Unfortunately, the OTS notified Marion County in a letter dated April 30, 1990, that its proposed stock offering was not considered feasible and the capital plan was not accepted.

The rejection of capital plan by the OTS has created a situation which Marion County's board of directors and management are in immediate danger of having control of the association taken away from them. The board of directors has been asked to approve a Consent Agreement which would give the OTS the authority to remove them and the management team or to merge the association with another institution at any time. Refusing to approve the Consent Agreement will likely result in the transfer of the association to the Resolution Trust Corporation which could also force removals or a merger.

The OTS rejected the capital plan because of concerns regarding the marketablility of the stock conversion. I do not object to the OTS's reluctance to permit Marion County to risk the $200,000 required to underwrite a stock conversion. This expense would likely have to be absorbed by the insurance fund in the event the offering was not successful. Marion County's current low level of GAAP capital and its marginal net income during recent quarters could certainly reduce the appeal of its stock to the investing public. What I do object to most strenuously is the necessity of removing the board of directors and management that has performed so well from an

institution for which the prospects are so favorable. Consider the following:

•Marion County has been consistently profitable, GAAP net income of $70,000, $206,000, $287,000, and $96,000 was reported for the 4 audit years ended September 30, 1989. Net income was reduced in the 1989 audit year because of a $91,000 increase in the provision for loan losses and reduced net interest income caused by rising interest rates. However, net income will begin recovering in the second quarter of 1990 and GAAP net income of $160,000 is projected for the 1990 calendar year. (All projections are for calendar years)

•Marion County projects continuing profitable operating results. Net income of $200,000 is projected for 1991 and $219,000 for 1992, 1993, and 1994. These projections assume continuation of current interest rate levels. Previous experience has shown Marion County's budgeting system to be very reliable; however, the net income projections for 1993 and 1994 are conservative because they do not reflect the increases in net income that will be realized from the growth of Marion County's capital base. These increases will be approximately $40,000 in 1993 and $54,000 in 1994 and will increase arithmetically each year thereafter.

•Marion County is solvent. GAAP net worth will become positive in June 1990 and is projected to increase to approximately $1.0 million the end of 1994. In addition, Marion County holds Net Worth Certificates currently totaling $1,050,000. Risk-based capital is projected to increase to approximately $2.1 million or 3.4 percent of total assets at the end of 1994.

•Marion County does not present any risk to the insurance fund. All but $3 million of its interest earning assets are invested in home mortgage loans, consumer loans, and government securities. The balance is secured by various commercial properties located in its normal lending territory. Nonperforming loans have been less than 1.0 percent of assets for the past 5 years and loan charge-offs have been negligible. There are adequate provisions for loan losses. Marion County does not have exces-

sive exposure to interest rate risk.

•Marion County's management is competent. The association's 5-year track record of consistent profits without the benefit of any capital base and its return to solvency from a deficit capital of -1.2 percent of total assets is the most outstanding management achievement in our caseload in the past decade. I am not aware of another association anywhere that has resurrected itself from GAAP-insolvency as Marion County has.

•Marion County's management has been cooperative. The association has complied with all provisions of the two Supervisory Agreements it has operated under for the past 4 years with one exception, its failure to submit an acceptable capital plan.

•Marion County's management has not been responsible for the substantial dissipation of the association's assets. Far from it; I estimate that because of the efforts of the Marion County management team, the potential liability to the insurance fund from this association has been reduced from at least $5 million to zero in the past 5 years.

•Marion County should be able to complete a stock conversion by 1994. The financial projections contained in the capital plan indicate that investors purchasing Marion County stock in December 1990 for the planned offering amount of $1 million would double their investment in 4 years, a return on equity of 18 percent. This is several percentage points above what is required by the marketplace and indicates that Marion County has the potential to be a very attractive equity investment. The attractive ROE is currently offset by Marion County's negligible GAAP capital. At the present time, investors are being asked to pay $1 million for GAAP capital of approximately $100,000, not a very attractive proposition. However, if the increases in GAAP capital projected in the capital plan are achieved over the next 4 years, Marion County could complete a successful stock offering before the end of 1994.

To summarize, Marion County has a 5-year track record of profitable operating results, the outlook for its future earnings has improved significantly, it is solvent, it does not present any risk to the insurance fund, it is well-managed, and it may very well be able to meet all of the FIRREA capital requirements by the end of 1994 through a stock conversion. It will not, however, be able to complete a stock offering before the end of 1990. For this reason alone, Marion County's board of directors and management face immediate removal.

I think this is just plain wrong. I cannot believe that Congress intended for the FIRREA legislation to be used as a pretext for removing a board of directors and management who have managed soundly and fulfilled all of their fiduciary responsibilities from an institution which is viable and poses no risk to the insurance fund. After all, this is America. The Federal government should not be permitted to take a profitable business away from anyone without a lengthy period of due process and until all reasonable alternatives are exhausted.

If the OTS is permitted to proceed on its current course, local control of this institution will be lost forever, which would be a tragedy. Hannibal is a venerable community of which a large portion of the housing stock was constructed before 1940. Because of functional obsolescence, e.g. no first floor bathrooms or driveways that open to the street, much of this housing does not qualify for FHLMC or FNMA underwriting guidelines. As a result, only 3 lenders, of which Marion County is by far the largest, are willing to grant home loans on any property in Hannibal. If Marion County is merged into a state-wide institution, as is currently being planned, it is likely that a large share of Hannibal's housing stock as well as that of the 5 rural communities in which Marion County has branch offices, will lose their most important, if not only, source of home financing. It is rumored that one of the potential acquirors is [ ]FSLA, a $2 billion, St. Louis-based institution which already has a $40 million branch office in Hannibal that was acquired through merger in 1981. Although this office has the largest deposit base of all Hannibal financial institutions, it has closed less than 10 loans since its acquisition by [ ] FSLA. It would be criminal if

is permitted to siphon another $50 million out of this community.

It has been extremely disheartening for me to watch the agency for which I have worked for 13 years focus so much of its energies on removing the board of directors and management of a small institution that has overcome so much adversity and for which the prospects are so bright. Add to this my knowledge that Marion County's managing officer is a selfless man who has devoted 42 years of his life to the institution, nurturing it from total assets of $250,000 to its present size, while never paying himself a salary of as much as $30,000, and is the closest reincarnation of the George Bailey character from the "It's A Wonderful Life" movie that I have encountered in my 13-year examining career, has only made me feel worse.

I am asking you to do what you can to ensure that Marion County's management team receives a fair shake in its future dealings with the Office of the Thrift Supervision and the Resolution Trust Corporation. This might include the following:

•Permitting Marion County to proceed with its stock offering if sufficient safeguards are established to reduce the risk-exposure of the insurance fund, e.g. the pledging of deposits or other assets by the board of directors and management of a sufficient amount to ensure that GAAP capital would not be reduced below zero if the offering did not succeed.

•Approving a Capital Exemption as outlined in OTS Thrift Bulletin 36a that would permit Marion County to postpone its stock offering until 1994. As noted previously, it is likely that a stock offering could be successfully completed before the end of 1994. This would enable Marion County to meet all FIRREA requirements by the statutory deadline. This alternative could also be augmented by the pledging of deposits or other assets by the board of directors and management until all capital requirements are met.

•Approving a Capital Exemption that would permit Marion County to meet FIRREA capital requirements solely through

retention of earnings. A Capital Exemption would pose negligible risk to the insurance fund because of Marion County's projected profitability for the next 5 years, traditional lending practices, minimal interest rate risk exposure, and competent management. Based on the projections of net income in Marion County's capital plan, the core and risk-based capital requirements would not be met until 1999. However, as noted previously, the net income projections for 1993 forward do not reflect increases net income that will be realized from the growth of Marion County's capital base. It is likely that the core and risk-based capital requirements will actually be met in 1997.

Forgiving an accrued interest payable of $591,000 on Net Worth Certificates that is owed to the insurance fund. Forgiving the payable would increase Marion County's core capital to $692,000 or 1.1 percent of total assets at the end of 1990 and to $1.6 million or 2.5 percent of total assets by the end of 1994. The core capital requirement would be met the following year. Risk-based capital would not be affected. I cite forgiving the payable only because I am aware that it is currently being sought by Marion County and it is my understanding that it is also being considered as a sweetener for a potential acquiror by the OTS. I am completely opposed to the insurance fund forgiving the payable for Marion County or any other institution. I see no reason why the insurance fund should absorb a $591,000 loss when, based on the net income projections contained in its capital plan, Marion County is fully capable of repaying all of the accrued interest payable by the end of 1995.

• Restructuring Marion County's Net Worth Certificates so that they may qualify as core capital. This could be accomplished by Marion County redeeming the outstanding NWCs by issuing marketable noncumulative perpetual preferred stock to the insurance fund. Marion County could sweeten the deal by repaying the accrued interest payable on the NWCs. Both Marion County and the insurance fund would benefit significatnly. Marion County would meet its core capital requirement immediately. The insurance fund could realize $1,050,000 by selling the preferred stock plus receiving payment of the $591,000 accrued interest payable. This type of restructuring is common

place in the corporate world and I see no reason why it cannot be accomplished here. It would require a stock conversion by Marion County, though.

Thank you for your consideration of this matter. I apologize for the length of this memorandum, but I found it necessary to present the case for permitting Marion County to survive, prosper, and continue to serve its community as it has for the past 104 years.

Sincerely,

_____

Michael J. Haley
Senior Examiner

cc: Mr. Wente
Mr. Halsne
Mr. O'Leary
Mr. Sage

APPENDIX F

12 U.S.C. § 1464 (d)

* * * *

(2) CONSERVATORS AND RECEIVERSHIPS

* * * *

(c) Grounds for appointment for state associations

Not withstanding any other provision of law, the Director shall have power and jurisdiction to appoint a conservator or receiver for an insured State savings association, if the Director determines that any of the following grounds for the appointment of a conservator or receiver exists:

* * * *

(iii) an unsafe or unsound condition to transact business, including having substantially insufficient capital or otherwise;

* * * *

APPENDIX G

12 U.S.C. § 1464(t)

* * * *

(7) EXEMPTION FROM CERTAIN SANCTIONS

* * * *

A) Application for exemption. Any savings association not in compliance with the capital standards prescribed under paragraph (1) may apply to the Director for an exemption from any applicable sanction or penalty for noncompliance which the Director may impose.

(B) Effect of grant of exemption. If the Director approves any savings association's application under subparagraph (A), the only sanction or penalty to be imposed by the Director for the savings association's failure to comply with the capital standards prescribed under paragraph (1) is the growth limitation contained in paragraph (6)(B) or Paragraph (6)(C), whichever is applicable.

(C) Standards for approval or disapproval.

(i) Approval. The director may approve an application for an exemption if the Director determines that –

(I) such exemption would pose no significant risk to the affected deposit insurance fund;

(II) the savings association's management is competent;

(III) the savings association is in substantial compliance with all applicable statutes, regulations, orders, and supervisory agreements and directives; and

(IV) the savings association's management has not engaged in insider dealing, speculative practices, or any other activities that have jeopardized the association's safety and

soundness or contributed to impairing the association's capital.

(ii) Denial or revocation of approval. The director shall deny any application submitted under clause (i) and revoke any prior approval granted with respect to any such application if the Director determines that the association's failure to meet any capital standards prescribed under paragraph (1) is accompanied by

(I) a pattern of consistent losses;

(II) substantial dissipation of assets;

(III) evidence of imprudent management or business behavior;

(IV) a material violation of any Federal law, any law of any State to which such association is subject, or any applicable regulation; or

(V) any other unsafe or unsound condition or activity, other than the failure to meet such capital standards.

(D) Submission of plan required. Any application submitted under subparagraph (A) shall be accompanied by a plan which–

(i) meets the requirements of paragraph 6(A)(ii); and

(ii) is acceptable to the director.

* * * *

APPENDIX H

12 U.S.C. §1729(f)

* * * *

(5) **NET WORTH CERTIFICATES (NWCS)**

* * * *

(J) Notwithstanding any other Federal or State law, net worth certificates purchased by the Corporation under this paragraph shall be deemed to be net worth for statutory and regulatory purposes.

* * * *

APPENDIX I

12 U.S.C. § 2901 and §2903

* * * *

SEC. 2901 CONGRESSIONAL FINDINGS AND STATEMENT OF PURPOSE

* * * *

(b) It is the purpose of this chapter to require each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.

* * * *

SEC. 2903 FINANCIAL INSTITUTIONS; EVALUATION

In connection with its examination of a financial institution, the appropriate Federal financial supervisory agency shall-

(1) assess the institution's record of meeting the credit needs of its entire communtiy, including low- and moderate income neighborhoods, consistent with the safe and sound operation of such institution; and

(2) take such record into account in its evaluation of an application for a deposit facility by such institution.

* * * *

APPENDIX J

Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) Pub. L.101-72, 103 Stat. 183 (August 9, 1989)

* * * *

Title IV – TRANSFERS OF FUNCTIONS, PERSONEL, AND PROPERTY

* * * *

SEC. 401. – FSLIC AND FEDERAL HOME LOAN BANK BOARD ABOLISHED

* * * *

(f) SAVINGS PROVISIONS RELATING TO FSLIC

(1) EXISTING RIGHTS, DUTIES, AND OBLIGATIONS NOT AFFECTED

Subsection (a) shall not affect the validity of any right, duty, or obligation of the United States, the Federal Savings and Loan Insurance Corporation, or any othe person which–

(A) arises under or pursuant to any section of title IV of the National Housing Act; and

(B) existed on the day before the date of the enactment of this act.

APPENDIX K

12 C.F.R. 567.10

Consequences of failure to meet capital requirements.

(a) Prior to January 1, 1991.
(1) During the period prior to January 1, 1991, the director may restrict the asset growth of any savings association not in compliance with capital standards; and
(2) During the period prior to January 1, 1991, the Director shall require any savings association not in compliance wiht capital standards to submit a plan that:
(i) Addresses the savings association's need for increased capital;
(ii) Describes the manner in which the savings association will increase capital so as to achieve compliance with capital standards;
(iii) Specifies types and levels of activities in which the savings association will engage;
(iv) Requires any increase in assets to be accompanied by an increase in tangible capital not less in percentage amount than the leverage limit then applicable;
(v) Requires any increase in assets to be accompanied by an increase in capital not less in percentage amount than required under the risk-based capital standard then applicable; and
(vi) Is acceptable to the Director.
(3) To be acceptable to the Director under this section, a plan must, in addition to satisfying all of the requirements set forth in paragraphs (a)(2)(i) through (a)(2)(v) of this section, contain a certification that while the plan is under review by the Office, the savings association will not, without the prior written approval of its District Directors:
(i) Grow beyond net interest credited;
(ii) Make any capital distributions; or
(iii) Act inconsistently with any other limitations on activities established by statute, regulation of by the Office in supervisory guidance for savings associations not meeting capital standards.
(4) If the plan submitted to the Director under paragraph (a)(2) of this section is not approved by the Office, the savings associa-

tion shall immediately and without any further action, be subject to the following restrictions:

(i) It may not increase its assets beyond the amount held on the day it receives written notice of the Director's disapproval of the plan; and

(ii) It must comply with any other restrictions or limitations set forth in the written notice of the Director's disapproval of the plan.

* * * *

Supreme Court, U.S.
FILED
MAY 7 - 1993
OFFICE OF THE CLERK

No. 92-1421

In the Supreme Court of the United States

OCTOBER TERM, 1992

MICHAEL J. HALEY, PETITIONER

v.

DEPARTMENT OF THE TREASURY AND MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

STUART SCHIFFER
Acting Assistant Attorney General

BARBARA C. BIDDLE
JENNIFER H. ZACKS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether substantial evidence supported the conclusion of the Merit Systems Protection Board that petitioner's disclosure of confidential information, in violation of Department of the Treasury standards of conduct, was not protected by the Whistleblower Protection Act because petitioner lacked a reasonable belief that the disclosed information revealed agency misconduct.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Statutes and regulations:

Community Reinvestment Act of 1977, 12 U.S.C. 2901(b)	6
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183	2
12 U.S.C. 1437 note (Supp. II 1990) (§ 401(f), 103 Stat. 356)	10
12 U.S.C. 1464(d)(2)(A) (Supp. II 1990)	10
12 U.S.C. 1464(d)(2)(C) (Supp. II 1990)	9
12 U.S.C. 1464(d)(2)(E) (Supp. II 1990)	10
12 U.S.C. 1464(s)(4)(A) (Supp. II 1990)	6, 11
12 U.S.C. 1464(t)(1) (Supp. II 1990)	2
12 U.S.C. 1464(t)(6)(A)(ii) (Supp. II 1990)	2
12 U.S.C. 1464(t)(7)(D) (Supp. II 1990)	6, 11
Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16:	
5 U.S.C. 1201 note (Supp. II 1990)	12
5 U.S.C. 1214(a)(3) (Supp. II 1990)	6
5 U.S.C. 1221(a) (Supp. II 1990)	6
5 U.S.C. 2302(b)(8) (Supp. II 1990)	2, 5
5 U.S.C. 2302(b)(8)(A) (Supp. II 1990)	5, 6, 9
5 U.S.C. 7511(a)	5
5 U.S.C. 7701	5
5 C.F.R. 1201.113(b)	8

Regulations—Continued: Page

12 C.F.R.:
Section 510.5(b) 4
Section 567.10(c) 11
31 C.F.R. 0.735-47 4

Miscellaneous:

S. Rep. No. 413, 100th Cong., 2d Sess. (1988) 12

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1421

MICHAEL J. HALEY, PETITIONER

v.

DEPARTMENT OF THE TREASURY AND MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 977 F.2d 554. The order of the Merit Systems Protection Board (Pet. App. B1-B2) denying review of the initial decision of the administrative judge and the administrative judge's initial decision (Pet. App. C1-C27) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1992. Pet. App. A9. A petition for rehearing was denied on December 2, 1992. Pet. App. D1. The petition for a writ of certiorari was filed on

March 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was dismissed from his position as a senior examiner with the Office of Thrift Supervision (OTS) because he released confidential information about a savings and loan institution, in violation of Department of the Treasury standards of conduct. He challenged his dismissal before the Merit Systems Protection Board, arguing that the disclosure of information was protected by the Whistleblower Protection Act of 1989, 5 U.S.C. 2302(b)(8) (Supp. II 1990). The Board rejected that challenge, and the court of appeals upheld the Board's decision.

1. In 1977, petitioner took a position as an examiner with the Federal Home Loan Bank Board. In 1989, when the Bank Board was replaced by OTS under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, petitioner became an examiner for OTS. Pet. App. A1-A2. While at OTS's District Office in Des Moines, Iowa, petitioner became familiar with the fiscal condition of the Marion County Mutual Loan and Building Association (MCM), a savings and loan association in Hannibal, Missouri. *Id.* at C2-C3.

Because MCM did not meet the strict capital requirements prescribed in FIRREA, it was required to submit a capital plan to OTS demonstrating that it could satisfy the requirements within a reasonable period of time. See 12 U.S.C. 1464(t)(1) and (6)(A)(ii) (Supp. II 1990). MCM submitted its capital plan in early 1990. Pet. App. A2. In submitting the plan,

MCM explained that "[t]he primary feature of the Plan will be to complete a conventional conversion to stock form by December 31, 1990, with a simultaneous conversion of net worth certificates and/or accrued interest payable to [Generally Accepted Accounting Principles] equity." *Ibid.*; C.A. App. 248.

In a letter dated April 30, 1990, OTS rejected MCM's capital plan. Pet. App. A2. OTS explained in the letter that it doubted that the proposed conversion would be successful and that an unsuccessful conversion would pose a significant risk to the insurance fund. C.A. App. 87-88. In conjunction with its denial of the plan, OTS asked MCM to sign a consent agreement that would (1) restrict MCM's operations; (2) provide for the appointment of a conservator or receiver; (3) authorize OTS to negotiate a merger or consolidation, subject to MCM's approval; and (4) allow changes in MCM's management. C.A. App. 90-103. MCM signed the consent agreement on July 23, 1990. Pet. App. C25. At the same time, MCM admitted that it did not have sufficient capital and that there were grounds for appointing a conservator or receiver under FIRREA. *Ibid.*; C.A. App. 90.

Meanwhile, petitioner prepared a memorandum dated July 3, 1990, criticizing OTS's rejection of MCM's capital plan. Pet. App. E1-E8.[1] Petitioner addressed the memorandum to Robert Maffitt, the Director of Field Operations for OTS, and sent it to both Maffitt and Bayard Plowman, the managing

---

[1] Although petitioner refers to two other memoranda that he prepared regarding MCM, Pet. 6-7, he limits his argument to the disclosures made in the July 3, 1990, memorandum. See Pet. 10-13.

officer of MCM; petitioner urged Plowman to send copies of the memorandum to members of Congress. *Id.* at A2. In the memorandum, petitioner acknowledged that MCM "w[ould] not be able to meet the toughened capital requirements mandated by the FIRREA legislation." *Id.* at E2. He also recognized that the cost of underwriting a stock conversion by MCM "would likely have to be absorbed by the insurance fund in the event the [public] offering [of stock] was not successful," and that MCM's poor financial condition "could certainly reduce the appeal of its stock to the investing public." *Ibid.* Nonetheless, he believed that MCM "may very well" be able to meet FIRREA's capital requirements by the end of 1994 if it were permitted to carry out a stock conversion. *Id.* at E5. He also believed that it would be "just plain wrong" for OTS to replace MCM's board of directors and management, as OTS was permitted to do under the consent agreement that it had asked MCM to sign. *Ibid.* Petitioner suggested that in order to "ensure that [MCM's] management team receives a fair shake," *id.* at E6, OTS consider several options, including allowing MCM to proceed with a stock offering if management was able to provide additional safeguards; exempting MCM from FIRREA's capital requirements; or restructuring MCM's net worth certificates to qualify as core capital, *id.* at E6-E7.

By sending the memorandum to Plowman, petitioner violated Department of the Treasury standards of conduct. Those standards prohibit the disclosure of confidential information to unauthorized persons. See 31 C.F.R. 0.735-47; 12 C.F.R. 510.5(b). On July 26,

1990, petitioner was fired because of that violation. Pet. App. A3.

Petitioner asked the Office of Special Counsel of the Merit Systems Protection Board (MSPB or Board) to investigate his dismissal, alleging that the disclosure of information in the memorandum was protected by the Whistleblower Protection Act, 5 U.S.C. 2302(b)(8) (Supp. II 1990).[2] The Office of Special Counsel determined that the disclosure was not protected and accordingly concluded that there was "no basis for further inquiry into [petitioner's] termination as a possible violation of [the Whistleblower Protection Act]." C.A. App. 72.

2. a. Petitioner then filed a challenge to his removal with the MSPB. In an initial decision for the Board, an administrative judge (AJ) rejected petitioner's challenge. Pet. App. C1-C27. The AJ first determined that petitioner could not appeal his removal to the Board pursuant to 5 U.S.C. 7701, because petitioner was not an "employee" for purposes of that provision, see 5 U.S.C. 7511(a). Pet. App. C3-C6.[3] The AJ did, however, find jurisdiction to consider

---

[2] The Whistleblower Protection Act, 5 U.S.C. 2302(b)(8)(A) (Supp. II 1990), protects a federal employee from disciplinary action based on

> any disclosure of information * * * which the employee * * * reasonably believes evidences—
>
> (i) a violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

[3] That determination was affirmed by the court of appeals, Pet. App. A3-A5, and petitioner does not seek further review of the determination in this Court.

petitioner's claim under the Whistleblower Protection Act, which was before the Board pursuant to 5 U.S.C. 1214(a)(3) (Supp. II 1990) and 1221(a) (Supp. II 1990). Pet. App. C6; see also *id.* at A1.

On the merits of that claim, the AJ determined that the Whistleblower Protection Act did not protect the disclosure of information in petitioner's memorandum. The AJ noted that the Act protects any disclosure that the employee "'reasonably believes evidence[s] a violation of' any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of [a]uthority, or a substantial and specific danger to public health and safety, if such disclosure is not specifically prohibited by law." Pet. App. C8 (quoting 5 U.S.C. 2302(b)(8)(A) (Supp. II 1990)). The AJ concluded that "it was not reasonable for [petitioner], an experienced examiner of savings associations, to believe that OTS's rejection of MCM's capital plan was a violation of FIRREA or the regulations implementing the statute." Pet. App. C16. The AJ observed that the Director of OTS has broad discretion in determining whether to approve a capital plan or an application for an exemption from FIRREA's capital requirements; the statutes provide for submission of a capital plan or exemption application that is "acceptable" to the Director, but they do not prescribe a standard for approval. *Ibid.*; see 12 U.S.C. 1464(s)(4)(A) (Supp. II 1990) and 1464(t)(7)(D) (Supp. II 1990).

The AJ further concluded that petitioner could not reasonably have believed that OTS's rejection of MCM's capital plan evidenced a violation of the Community Reinvestment Act of 1977 (CRA), 12 U.S.C. 2901(b). Petitioner claimed that OTS would

violate the CRA if it merged MCM with Roosevelt Federal Savings and Loan Association, which was based in St. Louis, Missouri, and, according to petitioner, had a poor record of making local loans. Pet. App. C11, C17. The AJ found, however, that petitioner "was merely speculating that Roosevelt would make an application for a merger and then that application [would] be approved and accepted by OTS." *Id.* at C18. Thus, petitioner "had no reasonable basis to conclude that Roosevelt would be the entity that would merge with MCM or that OTS would not proceed in accordance with its responsibilities under the CRA." *Ibid.*

The AJ similarly concluded that petitioner could not reasonably have believed that OTS's rejection of MCM's capital plan constituted an abuse of discretion, gross mismanagement or a gross waste of funds, or posed a substantial and specific threat to public safety. Pet. App. C19-C25. The AJ noted that petitioner's claim of an abuse of discretion was "belie[d]" by the fact that "[petitioner] himself considered the plan risky unless there were some substantial safeguards." *Id.* at C23. The AJ also noted that petitioner "had not talked to any of his supervisors concerning MCM's capital plan prior to [its] rejection." *Id.* at C21. Instead, petitioner "just proceeded to write up his letter expressing disagreement with his superior's actions." *Ibid.* That course of conduct, the AJ determined, "plainly [constituted] a lack of effort and inquiry on [petitioner's] part to learn the * * * facts governing the situation." *Ibid.*

Finally, the AJ rejected petitioner's contention that OTS violated due process and effected an unconstitutional taking of property without compen-

sation by asking MCM to sign a consent agreement. Pet. App. C25-C26.

b. The Board denied petitioner's petition for review of the initial decision. Pet. App. B1-B2; see 5 C.F.R. 1201.113(b).

3. The Federal Circuit "affirm[ed] the Board in all respects." Pet. App. A9. First, the court affirmed the Board's reading of its jurisdictional statutes. *Id.* at A3-A5. Next, the court affirmed the Board's decision on the merits, holding that it was supported by substantial evidence and was not arbitrary, capricious, or an abuse of discretion. While the court emphasized that it had evaluated "all the arguments set forth in the briefs," it declined to address each of the "multitude of arguments" individually, explaining that it limited its opinion to those with "sufficient merit to warrant consideration." Pet. App. A8, A3. In particular, the court rejected petitioner's contention that his unauthorized disclosure of confidential information was protected by the Whistleblower Protection Act. The court agreed with the Board that petitioner "did not have a reasonable belief that OTS's rejection of MCM's capital plan" violated any relevant statute or regulation, in light of petitioner's "experience as an Examiner and the clear language of the relevant authorities." Pet. App. A6, A7.[4]

ARGUMENT

Petitioner renews his contention that his unauthorized disclosure of confidential information was

---

[4] The court of appeals also rejected petitioner's contention that he had made a protected disclosure to Congress and that the administrative judge was biased. Pet. App. A7-A8. Petitioner does not renew those contentions in this Court.

protected by the Whistleblower Protection Act because he reasonably believed that the information evidenced agency wrongdoing. The court of appeals correctly rejected that fact-bound contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The Whistleblower Protection Act protects a disclosure of information that an employee "reasonably believes evidences" agency wrongdoing. 5 U.S.C. 2302(b)(8)(A) (Supp. II 1990). The MSPB concluded that it was not reasonable for petitioner to believe that the information in his memorandum regarding MCM evidenced wrongdoing by OTS. The court of appeals correctly held that the MSPB's conclusion was supported by substantial evidence. Petitioner's arguments to the contrary are unpersuasive.

Petitioner first argues (Pet. 12) that he reasonably believed that OTS's "threatened removal of management and appointment of a receiver" violated the provision of FIRREA that prescribes criteria for the appointment of a receiver or conservator, 12 U.S.C. 1464(d)(2)(C) (Supp. II 1990). That provision, however, never came into play here, because no receiver or conservator was ever appointed for MCM. At the time petitioner distributed his memorandum, OTS had merely asked MCM to sign a consent agreement under which a conservator or receiver could be appointed. Because OTS's request did not trigger the FIRREA provision governing the appointment of conservators and receivers, petitioner could not

reasonably have believed that OTS was violating that provision.[5]

Petitioner also argues (Pet. 13) that OTS "incorrectly comput[ed] [MCM's] capital" by failing to include MCM's net worth certificates as "core capital," one of the categories of capital for which FIRREA establishes minimum requirements. Petitioner further suggests (*ibid.*) that OTS's failure to include the certificates in core capital violated FIRREA's savings clause.[6] Petitioner's own memorandum defeats this argument, for it reveals that petitioner did not himself believe that the certificates had to be counted as core capital. Petitioner stated in the memorandum that MCM "will not be able to meet the toughened capital requirements mandated by * * * FIRREA." Pet. App. E2. Moreover, by suggesting that the certificates be "[r]estructur[ed] * * * so that they may qualify as core capital," *id.* at E7, petitioner

---

[5] If a conservator or receiver had been appointed without MCM's consent, MCM could have sought judicial review of the appointment. 12 U.S.C. 1464(d)(2)(A) and (E) (Supp. II 1990). As it was, however, MCM's board of directors approved the consent agreement and acknowledged that there were grounds for the appointment of a conservator. C.A. App. 90. Thus, MCM's board apparently did not share petitioner's purported view that an appointment would have been illegal.

[6] The savings clause states that FIRREA "shall not affect the validity of any right, duty, or obligation of the United States, the Federal Savings and Loan Insurance Corporation, or any other person, which * * * arises under or pursuant to any section of title IV of the National Housing Act * * * [and] existed on the day before the date of the enactment of [FIRREA]." Pub L. No. 101-73, § 401(f), 103 Stat. 356 (codified at 12 U.S.C. 1437 note (Supp. II 1990)).

implicitly acknowledged that as then structured, they did not qualify as core capital.

Petitioner next contends (Pet. 13) that OTS was required to grant MCM an exemption from FIRREA's capital requirements, even though MCM did not submit an acceptable capital plan to OTS. Petitioner is wrong. FIRREA expressly states that any application for an exemption "*shall be* accompanied by a plan which * * * is acceptable to the Director [of OTS]." 12 U.S.C. 1464(t)(7)(D) (Supp. II 1990) (emphasis added); see also 12 U.S.C. 1464(s)(4)(A) (Supp. II 1990). The regulations repeat the requirement that an exemption application be accompanied by an acceptable plan. See 12 C.F.R. 567.10(c). Because MCM did not submit an acceptable plan, OTS was not required to grant it an exemption, and petitioner could not reasonably have believed otherwise, in light of the clarity of the statute and regulations on this point.

Nor could petitioner reasonably have believed that OTS "ignored its responsibility to enforce the Community Reinvestment Act, 12 U.S.C., Sec. 2901 & 2903," as petitioner asserts, Pet. 14. Petitioner alleges that OTS violated the CRA by "planning for [a] merger * * * with an institution [with a poor lending record]." Pet. 14. The CRA would have required OTS to take into account the loan record of an institution before approving its merging with MCM. The CRA did not apply here, however, because OTS did not approve any such merger. Petitioner's speculation that OTS would have violated the CRA if it had approved a merger does not entitle him to protection under the Whistleblower Protection Act.

Petitioner argues that his "objection to the rejection of [MCM's capital] plan was eminently reasonable" since OTS later approved a revised capital plan submitted by MCM. Pet. 15. The relevant question, however, is not whether petitioner's view was reasonable; it is whether OTS's rejection of the plan violated the law or constituted any of the other types of wrongdoing listed in the Whistleblower Protection Act. Petitioner's memorandum fails to suggest agency wrongdoing. On the contrary, petitioner suggested agreement with OTS's rationale for rejecting the plan, noting that he "d[id] not object to the OTS's rel[u]ctance to permit [MCM] to risk the $200,000 required to underwrite a stock conversion," because if the offering were not successful, the expense "would likely have to be absorbed by the insurance fund." Pet. App. E2. It was only after MCM revised its plan by providing personal guarantees for the stock conversion and submitting a list of potential buyers that OTS's concerns were alleviated and the plan was approved.

2. Finally, contrary to petitioner's claim (Pet. 15-16), the court of appeals' decision does not weaken statutory protection for genuine whistleblowers. Published allegations of governmental misconduct remain protected "if [they] meet[] the requisite reasonable belief test." S. Rep. No. 413, 100th Cong., 2d Sess. 13 (1988). But where, as here, the allegations are not founded on a reasonable belief, their dissemination does not "assist[] in the elimination of fraud, waste, abuse, and unnecessary Government expenditures," 5 U.S.C. 1201 note (Supp. II 1990), and is not protected under the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

STUART SCHIFFER
Acting Assistant Attorney General

BARBARA C. BIDDLE
JENNIFER H. ZACKS
Attorneys

MAY 1993

Supreme Court, U.S.
FILED
MAY 17 1993
OFFICE OF THE CLERK

No. 92-1421

In The Supreme Court of the United States

OCTOBER TERM, 1992

Michael J. Haley,

Petitioner,

vs.

Department of the Treasury, and
Merit Systems Protection Board,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY TO RESPONDENTS BRIEF IN OPPOSITION

Samuel H. Liberman, #17660
8000 Maryland, Suite 750
Clayton, Missouri 63105
(314) 862-3333

Attorney for Petitioner

TABLE OF CONTENTS

Page

Argument 1
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Pickering v.
Board of Education,
391 U.S. 563, 568-573 (1968) 12
Southside Public Schools v.
Hill,
827 F.2d 270, 272-3 (8th Cir. 1987) 12
Anderson v.
Central Point School Dist.,
554 F. Supp. 600, 608 (D. Or. 1982) 12

Regulations:

12 C.F.R. Sec. 567.10(c) 7
12 C.F.R. Sec. 567.10(b)(2) 7
12 C.F.R. Sec. 567.10(b) 7
12 C.F.R. Sec. 567.10(a)(3) 7
12 C.F.R. Sec. 567.10(a)(2)(i)-(v) 8
12 C.F.R. 567.10(a)(2)(vi) 8
T.B. 36-a 8

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI IN ORDER TO SET AN APPROPRIATE STANDARD FOR JUDGING THE REASONABILITY OF WHISTLEBLOWERS BELIEFS.

Respondent characterizes the question presented in this case as to whether substantial evidence supported the conclusion of the Merit Systems Protection Board that Petitioners disclosure was not protected by the Whistleblower Protection Act because Petitioner lacked a reasonable belief that the disclosed information revealed Agency misconduct. Respondent characterizes Petitioners contention that he reasonably believed that the information evidenced the Agency wrong doing, as a "fact-bound contention". Brief in Opposition, 9.

Respondent raises the spector of a detailed evidentiary review.

The question of a purported whistleblowers belief

is and must always be an evidentiary question. Petitioner contends that because there is presently no Supreme Court ruling on this matter, and because a finding that the Petitioner did not have a reasonable belief that the Agency was doing wrong potentially invalidates every imaginable whistleblower claim; the Court must provide some guidance. This is precisely the reason why certiorari should be granted.

Since it is unlikely that an alleged whistleblower would risk his or her job and reputation, without having a reasonable belief that the law or regulations had been violated, Petitioner contends that the Court should set strict limits for review of the question of reasonable belief. Petitioner argues that in cases where there is no suggestion of a possible motive other than preventing unlawful action, the lack of a reasonable belief should be found only in the event that:

1. There is positive evidence of bad faith on

the part of the whistleblower;

2. There is positive evidence of the whistleblower's actual non-belief; or

3. The Agency can demonstrate that no reasonable person could have believed that there was a violation of law, rule, regulation, gross mismanagement, gross wasted funds or an abusive authority or a substantial specific danger to public health or safety.

Under such a standard the case before the Court would be a very easy case.

There is no evidence other than the Petitioners own testimony as to his good faith and actual belief. A mere perusal of the evidence would reveal that the circumstances indicate numerous reasonable grounds for belief that different laws, rules and regulations had been violated, and that the Agency abused its authority.

The basic contentions as to the Petitioners reasonable belief as to Agency malfeasance are set forth

in the original petition. Petitioner here only responds to arguments raised in the Brief in Opposition.

II. THE THREAT TO APPOINT A CONSERVATOR UNLESS MCM SIGNED THE CONSENT TO MERGE AGREEMENT WAS ITSELF A VIOLATION OF THE STATUTES.

Respondent argues that because no receiver was ever appointed the threat to appoint one was not a violation of law. Brief in Opposition, 10. A whistleblower need not wait until the violation is completed, but can blow the whistle in order to prevent the violation of law, rule or regulation. Respondent does not even argue the point that the Agency had no legal basis for making this threat, but merely argues that since MCM caved in and signed the consent agreement, it therefore conceded that there were grounds for the threat. The fact that MCM signed the consent agreement, does not belie the fact that the Agency in fact had no legal grounds or that Petitioner

Haley saw that the Agency was threatening to do something which it did not have legal grounds to do. The fact that the illegal threat was successful does not effect Petitioner Haley's right and duty to report the illegal conduct. This legal violation alone is sufficient to prove the reasonability of his belief that the law was in process of being violated under the standards suggested above.

III. THE PETITIONER HAD A REASONABLE BELIEF THAT THE AGENCY WAS IN THE PROCESS OF VIOLATING THE COMMUNITY REINVESTMENT ACT.

Respondent argues that Petitioner Haley could not have reasonably believed that there was a violation of the Community Reinvestment Act, because the purposed merger never took place. Brief in Opposition, 7 and 11.

The record showed that the Roosevelt Bank had in fact been solicited to merge and take over MCM. C.A. App. 168, 182, 305, 308, 309; Tape 2 at 2-7; Tape 5 at 14-

18. The Examiner-in-Charge believed that is was a "done deal," C.A. Tr. Tape 2 at 2; Tape 5 at 13-14, 16-17. Roosevelt Bank had a miserable record of compliance with the Community Reinvestment Act, C.A. App. 168, 325-340; Tape 2 at 27; Tape 4 at 23-24; Tape 5 at 14-18, 24-32. Despite said record the Agency had recently granted Roosevelt permission to merge with a failing institution in a nearby town. C.A. Tr. Tape 2 at 4.

Petitioner was not required to wait until MCM was merged out of existence, before he blew the whistle. There is no question that his belief that violation of the CRA was occurring was reasonable.

To the extent that the Administrative Judge found that Petitioner Haley was merely speculating his finding is completely unsupported by the evidence. The evidence shows that the CRA violation was in the process of happening, and would have been completed but for Petitioner's blowing the whistle.

IV. PETITIONERS BELIEF THAT MCM WAS ENTITLED TO AN EXEMPTION FROM SANCTIONS WAS IMMINENTLY REASONABLE.

The Respondent argues that page 11 of its Memorandum in Opposition that in order to have an exemption from the need to have a plan acceptable to the director, an institution must have a plan acceptable to the director. As pointed out at page 13 of the Petition for Certiorari, this interpretation is at odds with the Treasury's own regulations and the OTC's own interpretation. 12 C.F.R. Sec. 567.10(c), cited by Respondent, Brief in Opposition, 11, is not applicable. It refers only to requests for exemption made pursuant to Sec. 567.10(b)(2). Sec. 567.10(b) applies only to requests made after January 1, 1991. Petitioner was terminated on July 26, 1990, before this subsection became effective.

12 C.F.R. Sec. 567.10(a)(3) provides that prior to January 1, 1991, in order to be acceptable to the director,

the plans must meet the requirements of Sec. 567.10(a)(2)(i)-(v). It omits 567.10(a)(2)(vi), which provides "it is acceptable to the director," thus avoiding the circular argument of Respondent, under which no exemption could ever be granted, because the institution would have to have obtained approval for the plan, in which case no exemption would be needed.

T.B. 36-a, C.A. App. 105-111, was issued on March 8, 1990. In its provisions relating to granting capital exemptions, there is no requirement for an approved capital plan. C.A. App. 106. Petitioner Haley reasonably believed at the time of his disclosure, that Agency approval of the plan was not a requirement for exemption from sanctions otherwise applicable to an institution which did not have an approved plan.

V. PETITIONER WAS NOT BLOWING THE WHISTLE ON THE REJECTION OF MCM'S CAPITAL PLAN.

Respondent repeatedly misleads the Court as to the issue in this case by inferring that the primary question in this case is whether the Agency's rejection of MCM's initial capital plan was unreasonable.

The Respondent makes the contention that the Petitioner did not have a reasonable belief that the rejection of the plan was a violation of law or regulation. Brief in Opposition, 6 and 12.

Petitioner in his original Memorandum did not claim that the original rejection of the plan was invalid or a violation of law. By misstating the issue the Respondents, the Administrative Judge and the Court below, attempted to avoid the violations of law, rule and regulations which Petitioner did set forth. Petitioner believed that the plan could be successful with certain additional conditions. He stated this in his Memoranda.

Petitioner was in fact correct in this belief. The Agency subsequently allowed the plan to go ahead with some of the conditions suggested by Petitioner. Respondent concedes that after these said modifications, really conditions, were met, the plan was approved and was successful. Brief on Opposition, 12. Somehow the Board, the Court Below and the Respondents have managed to lose sight of the fact that it was only because of Petitioner Haley's intervention, that the merger did not take place and that MCM was allowed to go ahead with its plan.

VI. RESPONDENT INCORRECTLY CHARACTERIZED PETITIONER'S ARGUMENT WITH RESPECT TO MCM'S NET WORTH CERTIFICATES.

Petitioner does not on page 13 of the Petition state that the Net Worth Certificates were required to be core capital. See Brief in Opposition, 10.

Rather the Petitioner argued that the savings

provision of FIRREA, required that these NWC's continue to be recognized as statutory capital. Moreover, he argues that failure to honor the contractual obligation involved in the issuance of the Net Worth Certificates by MCM to the government agency (FDIC) was a constitutional violation. This position has been upheld in the authority cited by Petitioner at page 14 of its Petition. If the Claims Court has accepted this argument, it is hard to see how Petitioner was unreasonable in accepting them.

While the argument can be made (and Petitioner conceded), that the Net Worth Certificates should be excluded from "core" capital, they certainly could not be excluded from regulatory capital altogether. See Petition for Certiorari, 12.

Finally, Petitioner suggested that these Net Worth Certificates could be converted to core capital, as is conceded by Respondent. Brief in Opposition 10-11. The Agency already knew that such a conversion was

permissible at the time Petitioner was terminated. C.A. App. 166, 188.

VII. THE RESPONDENT INCORRECTLY SUGGESTS THAT PETITIONER HAS SOME DUTY TO CONDUCT A FURTHER INVESTIGATION BEFORE BLOWING THE WHISTLE.

Respondents quote the Administrative Judge's holding that Petitioners course of conduct plainly constituted a lack of effort and inquiry on his part into the facts governing a situation. Brief in Opposition, 7.

There is no law requiring Petitioner to proceed through agency channels before blowing the whistle. See Pickering v. Board of Education, 391 U.S. 563, 568-573 (1968); Southside Public Schools v. Hill, 827 F.2d 270, 272-3 (8th Cir. 1987); Anderson v. Central Point School Dist., 554 F. Supp. 600, 608 (D. Or. 1982). The law was drafted to encourage whistleblowing and not to require that the whistleblower have complete proof of every fact

and detail before daring to come forth and make a charge.

In fact, the record in this case shows a long continuing course of conduct by Petitioner in the effort to save MCM from destruction by the Agency. C.A. App. 134-235, 54, 59, 62; Tape 1 at 6, 7, 10, 11; Tape 2 at 42-3; Tape 3 at 127; Tape 4 at 4-9. Petitioner only blew the whistle when he became convinced that the merger with Roosevelt was a done deal as far as the Agency was concerned. C.A. Tape 2 at 2; Tape 5 at 13-14, 16-17.

CONCLUSION

For the reasons set forth above the Respondents arguments are not well taken, and the Court should review this case in order to clarify the standard for a review where the contention is made that the alleged whistleblower does not have a reasonable belief that there has been a violation of law, rule, regulation, gross mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety, and order the correct application of said standard to this case.

Respectfully submitted,

SAMUEL H. LIBERMAN, #17660
Attorney for Petitioner
8000 Maryland, Suite 750
Clayton, Missouri 63105
(314) 862-3333